DOCKET

No. 08-1301

Title:	Thomas Carr, Petitioner
	v.
	United States
Docketed:	April 23, 2009
Lower Ct:	United States Court of Appeals for the Seventh Circuit
Case Nos.:	(08-2008)
Decision Date:	December 22, 2008

Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Mar 11 2009	Application (08A806) to extend the time to file a petition for a writ of certiorari from March 22, 2009 to April 22, 2009, submitted to Justice Stevens.
Mar 12 2009	Application (08A806) granted by Justice Stevens extending the time to file until April 22, 2009.
Apr 22 2009	Petition for a writ of certiorari filed. (Response due May 26, 2009)
May 21 2009	Order extending time to file response to petition to and including June 25, 2009.
Jun 17 2009	Order further extending time to file response to petition to and including July 24, 2009.
Jul 20 2009	Order further extending time to file response to petition to and including August 7, 2009.
Aug 6 2009	Brief of respondent United States in opposition filed.
Aug 19 2009	DISTRIBUTED for Conference of September 29, 2009.
Aug 19 2009	Reply of petitioner Thomas Carr filed. (Distributed)
Sep 30 2009	Petition GRANTED.
Nov 4 2009	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including December 3, 2009.
Nov 4 2009	The time within which to file respondent's brief on the merits is extended to and including January 15, 2010.
Nov 30 2009	SET FOR ARGUMENT ON Wednesday, February 24, 2010.
Dec 3 2009	Motion to dispense with printing the joint appendix filed by petitioner Thomas Carr.
Dec 3 2009	Brief of petitioner Thomas Carr filed.
Dec 10 2009	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
Dec 10 2009	Brief amici curiae of Law Professors filed.
Dec 26 2009	CIRCULATED.
Dec 30 2009	Record for U.S.C.A. for 7th Circuit is electronic.
Jan 6 2010	Record received from U.S.D.C. for the Northern District of Indiana. (1 envelope)
Jan 11 2010	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.
Jan 14 2010	The time within which to file respondent's brief on the merits is further extended to and including January 19, 2010.
Jan 19 2010	Brief of respondent United States filed. (Distributed)
Jan 25 2010	Brief amici curiae of Kansas, et al. filed. (Distributed)
Feb 16 2010	Reply of petitioner Thomas Carr filed. (Distributed)
Feb 24 2010	Argued. For petitioner: Charles A. Rothfeld, Washington, D. C. For respondent: Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

081301 APR 22 2009

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No.

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602

Counsel for Petitioner

QUESTIONS PRESENTED

The President signed the Sex Offender Registration and Notification Act ("SORNA") into law on July 27, 2006. Pub. L. 109-248 §§ 101-55, 120 Stat. 587. SORNA requires persons who are convicted of certain offenses to register with state and federal databases. See 42 U.S.C. § 16913(a). The law imposes criminal penalties of up to ten years of imprisonment on anyone who "is required to register * * * travels in interstate or foreign commerce * * * and knowingly fails to register or update a registration." 18 U.S.C. § 2250(a). On February 28, 2007, the Attorney General retroactively applied SORNA's registration requirements to persons who were convicted before July 27, 2006. 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3. The two questions presented are:

1. Whether a person may be criminally prosecuted under § 2250(a) for failure to register when the defendant's underlying offense and travel in interstate commerce both predated SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a) of a person whose underlying offense and travel in interstate commerce both predated SORNA's enactment.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Carr respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-13a) is reported at 551 F.3d 578. The district court's order (App., *infra*, 14a-19a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari to April 22, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 9 provides in relevant part:

> No bill of attainder or ex post facto law shall be passed.

Section 113 of the Sex Offender Registration and Notification Act ("SORNA"), part of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248 §§ 101-55, 120 Stat. 587, codified at 42 U.S.C. § 16913, provides in relevant part:

> (a) A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides * * * .
>
> * * * * *

> (d) The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act * * * .

SORNA's criminal provision, codified at 18 U.S.C. § 2250(a), provides in relevant part:

> Whoever (1) is required to register under [SORNA]; (2) * * * (B) travels in interstate or foreign commerce * * * and (3) knowingly fails to register or update a registration as required by [SORNA]; shall be fined under this title or imprisoned not more than 10 years, or both.

The Attorney General's regulation, 28 C.F.R. § 72.3, provides in relevant part:

> The requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.

STATEMENT

The Sex Offender Registration and Notification Act ("SORNA"), Pub. L. 109-248 §§ 101-55, 120 Stat. 587, makes it a crime for a person who is required to register as a sex offender to travel in interstate commerce and then knowingly fail to update his or her registration. 18 U.S.C. § 2250(a). Although national standards for registration of such persons have been in place since enactment of the 1994 Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub L. 103-322, 108 Stat. 1796, the enactment of SORNA in 2006 drastically increased the penalties associated with failure to register. In the decision be-

low, the Seventh Circuit held that SORNA's enhanced penalties may be imposed retroactively upon a person who both committed the underlying offense and traveled in interstate commerce prior to enactment of the statute.

That holding contributes to extraordinary confusion in the lower courts on whether SORNA was meant to apply to registration-triggering conduct that took place prior to its enactment and, if so, whether the retroactive application of the statute violates the Ex Post Facto Clause. The Seventh Circuit's decision creates an acknowledged conflict in the circuits on the first of these questions, departing from the contrary rulings of three other courts of appeals and at least 17 district courts—none of which has been appealed by the government. And the ruling below that retroactive application of SORNA to persons who traveled in interstate commerce prior to enactment of the statute is constitutional conflicts with the holdings of more than a dozen district courts—again, none of which has been appealed by the government. Because the questions here are ones of tremendous practical importance (potentially affecting untold thousands of people), have led to extensive litigation and uncertainty in the lower courts, and were answered incorrectly by the Seventh Circuit, review by this Court is warranted.

A. Statutory and Regulatory Background

In 1994, Congress passed the Wetterling Act. Under that statute, as amended, "[a] person who has been convicted of an offense which requires registration * * * and who moves to another State, shall report the change of address to the responsible agency in the State the person is leaving, and shall comply with any registration requirement in the new State

of residence." 42 U.S.C. § 14071(b)(5). The maximum penalty for an offender's first conviction for failure to abide by this requirement was a one-year term of imprisonment. *Id.* § 14072(i)(4).

Congress amended the Wetterling Act several times but eventually decided that "the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards * * * that would close potential gaps and loopholes under the old law, and generally strengthen the nationwide network of sex offender registration and notification programs." U.S. Dept. of Justice, National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008). In 2006, Congress accordingly passed SORNA, which the President signed into law on July 27, 2006. The statute created a new, national sex offender registry to supplement the one created by the Wetterling Act, but it has not yet completely supplanted the older law. Under SORNA's provision repealing the Wetterling Act, the earlier Act remains in effect until at least July 27, 2009, depending on the rate at which the States implement SORNA. See *infra* note 9.

SORNA requires all persons convicted of sex offenses to register and maintain their registration status wherever they live, work, or attend school. 42 U.S.C. § 16913(a). On its face, SORNA requires only that newly convicted persons register. See *id.* § 16913(b). On February 28, 2007, however, the Attorney General exercised his authority under 42 U.S.C. § 16913(b) to issue a regulation expanding SORNA's reach. The regulation provides that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for

which registration is required prior to the enactment of that Act." Office of the Attorney General, Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8896, codified at 28 C.F.R. § 72.3.

While SORNA's registration requirements apply to all persons convicted of certain offenses, the statute strictly limits the circumstances under which persons convicted of *state-law* offenses may be criminally convicted for failure to register under federal law. Any person may be prosecuted for failing to register if he or she was convicted under federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States. 18 U.S.C. § 2250(a)(2)(A). But a person who was initially convicted under state law may be prosecuted under § 2250(a) only if he or she "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." § 2250(a)(2)(B).

B. Procedural Background

1. On May 18, 2004, petitioner pled guilty to first-degree sexual abuse in the Circuit Court of Walker County, Alabama. See App., *infra*, 15a. He was sentenced to serve two years in prison and thirteen years' probation, but received credit for time served and was released from prison on July 6, 2004. He was also required to register as a sex offender, and he complied with Alabama's registration requirement upon his release. See *ibid.*

Sometime in 2004 or 2005, petitioner relocated from Alabama to Fort Wayne, Indiana. App., *infra*, 15a. He was arrested there on unrelated charges on July 9, 2007. As of that date, he had not complied in Indiana with SORNA's registration requirements, to

which he was subject pursuant to the Attorney General's regulation issued on February 28, 2007. *Ibid.*

2. On August 27, 2007, petitioner was indicted in the United States District Court for the Northern District of Indiana for violation of SORNA's registration requirement. App., *infra*, 3a, 12a. He moved to dismiss his indictment on the ground that his travel in interstate commerce predated the enactment of the statute. *Id.* at 14a. The district court denied the motion. *Id.* at 18a. Petitioner thereafter entered a conditional guilty plea and was eventually sentenced to serve a 37-month prison sentence.

The Seventh Circuit consolidated petitioner's case with an appeal from a similarly situated defendant and affirmed Carr's conviction. App., *infra*, 1a-12a. Regarding the meaning of SORNA, the court of appeals held that "the statute does not require that the defendant's travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it." *Id.* at 3a-4a. The court reasoned that Congress intended the interstate travel element "to establish a constitutional predicate for the statute * * * rather than to create a temporal requirement." *Id.* at 5a.[1]

---

[1] Although the decision below suggests that "the only ground of [petitioner's] appeal is that his conviction violates the ex post facto clause," App., *infra*, 12a, petitioner also pressed the antecedent statutory interpretation issue in the proceedings below, citing numerous district court decisions that avoid the ex post facto issue by resolving the statutory question in defendants' favor. See Pet. Br. to 7th Cir. at 16-17 (June 23, 2008). In any event, even if petitioner had not advanced the statutory issue below, this Court's practice "permits[s] review of an issue not pressed so long as it has been passed upon," *United States* v.

The court of appeals also held that applying SORNA to defendants who were convicted and traveled in interstate commerce before the statute was enacted does not violate the Ex Post Facto Clause so long as the defendant is given a "reasonable time" in which to register. App., *infra*, 9a. In the court's view, SORNA "creates a continuing offense in the sense of an offense that can be committed over a length of time," meaning that "the violation continues until [the defendant] does register." *Id.* at 2a-3a. The court affirmed petitioner's conviction under this standard because he was indicted for failing to register by July 2007, providing "a sufficient grace period" to allow him to register after promulgation of the Attorney General's regulation on February 28, 2007. *Id.* at 11a. The court reversed the other appellant's conviction on the ground that his indictment did not give him sufficient notice to allow him to register. *Id.* at 9a-11a.

The Seventh Circuit acknowledged that its construction of SORNA "creates an intercircuit conflict" with the Tenth Circuit. App., *infra*, 6a. *United States* v. *Husted* also involved a defendant prosecuted under SORNA, who had last traveled in interstate commerce prior to SORNA's enactment. 545 F.3d 1240, 1241-1242 (10th Cir. 2008). The Tenth Circuit held that, "[b]ased on SORNA's plain language, * * * § 2250(a)(2)(B) does not apply to an individual whose interstate travel is complete before July 27, 2006." *Id.* at 1243. But the Seventh Circuit reasoned that the Tenth Circuit's reading of SORNA "makes no

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Williams, 504 U.S. 36, 41 (1992)—as the SORNA construction question certainly was.

sense" and it "therefore disagree[d] with the Tenth Circuit's interpretation." App., *infra*, 5a-6a.

REASONS FOR GRANTING THE PETITION

Both the statutory and the constitutional aspects of the holding below warrant this Court's attention. The Seventh Circuit acknowledged that its reading of SORNA differs from that of the Tenth Circuit, and that conflict in the courts of appeals has grown since the decision below was issued. In addition, at least two dozen district courts have held that SORNA either does not apply retroactively or cannot constitutionally be applied to persons whose interstate travel predated the statute's enactment. As a consequence, identical conduct is resulting in wildly divergent treatment of criminal defendants depending upon the circuit or district in which they reside. Particularly because the holding below cannot be squared either with the language and purpose of SORNA or with this Court's precedents, further review is in order.

I. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER A PERSON MAY BE PROSECUTED UNDER SECTION 2250(a) FOR FAILURE TO REGISTER WHEN THE UNDERLYING OFFENSE AND TRAVEL IN INTERSTATE COMMERCE PREDATED SORNA'S ENACTMENT.

The Court should settle whether Congress meant SORNA to apply retroactively to persons whose underlying offense and interstate travel both predated enactment of the statute. The Seventh Circuit's holding on this point conflicts with decisions of other courts of appeals (as the court below acknowledged) and of numerous district courts. And that holding is

wrong: It departs from the plain statutory text; misstates the congressional purpose; and disregards the presumptions against retroactivity, and in favor of lenity and the avoidance of constitutional questions, that have been consistently applied by this Court. Review of the decision below accordingly is warranted.

A. The Seventh Circuit's Construction Of Section 2250(a) Squarely Conflicts With Decisions Of Other Courts Of Appeals.

At the outset, there is a clear conflict in the circuits and pervasive confusion in the district courts on whether SORNA applies to persons whose travel in interstate commerce took place prior to passage of the statute. The Seventh Circuit, of course, held in this case that it does, and the Eleventh Circuit arguably agrees.[2]

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[2] In *United States* v. *Dumont*, 555 F.3d 1288 (11th Cir. 2009), the Eleventh Circuit addressed the case of a defendant who had traveled in interstate commerce after SORNA's enactment but prior to issuance of the Attorney General's rule. *Id.* at 1290. The court held that the defendant was not required to register under SORNA until the Attorney General issued the rule. *Id.* at 1291. But the court also held that the "travels" element of § 2250 is simply a jurisdictional hook, and therefore could be applied retroactively. *Ibid.* Thus, the defendant could be prosecuted under SORNA even though his travel occurred before the Act was applicable to him. This same logic would apply to an individual who traveled prior to enactment of the statute, making the Eleventh Circuit's approach consistent with the Seventh Circuit's decision below. The Eleventh Circuit recently affirmed the *Dumont* rule in dicta in *United States* v. *Ambert*, No. 08-13139, 2009 WL 564677, at *3 (11th Cir. Mar. 6, 2009). But see *United States* v. *Chatterson*, No. 2:08-cr-144, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009) (finding that Eleventh Circuit has reserved this issue).

The Tenth and Eighth Circuits, in contrast, both relied on the plain meaning of the statutory language to hold that § 2250(a)(2)(B) applies only to travel completed after the enactment of SORNA. In *Husted*, the Tenth Circuit reversed the conviction of an individual who moved from Oklahoma to Missouri, and failed to register in Missouri, prior to enactment.[3] 545 F.3d at 1241-1242. The court held that, "[b]ased on SORNA's plain language, * * * § 2250(a)(2)(B) does not apply to an individual whose interstate travel is complete before July 27, 2006." *Id.* at 1243. The court relied on Congress's use of the present tense "travels" where it could just as easily have used the past tense ("traveled") or present perfect tense ("has traveled"). *Id.* at 1243-1244. The Tenth Circuit buttressed its statutory interpretation with the presumption against retroactivity, noting that Congress had not clearly stated its intention to apply SORNA to conduct predating its enactment. *Id.* at 1246-1247.

In reaching this conclusion, the Tenth Circuit rejected the government's request that it apply the "absurdity doctrine" to ignore the statute's plain language, finding that Congress's decision to apply the criminal penalties of § 2250 only to sex offenders who travel in interstate commerce after SORNA's enactment does not "shock[] the general moral or common sense." *Husted*, 545 F.3d at 1244-1245. To the contrary, the court opined that Congress had good reason to apply § 2250(a)(2)(B) prospectively only, as "prospective legislation is typical of the legislative

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[3] While the exact date of Husted's move was unclear from the record, there was no dispute that it occurred prior to SORNA's enactment. *Husted*, 545 F.3d at 1242.

task, and Congress may well have wished to avoid the very ex post facto concerns Husted raises before this court." *Id.* at 1245.

The Eighth Circuit reached the same conclusion in *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008). Although it there upheld the conviction of a defendant who traveled in interstate commerce in the "gap" period between the enactment of SORNA and the issuance of the Attorney General's regulation applying the Act to offenders convicted prior to SORNA's enactment, the court stated that "[t]he only punishment that can arise under SORNA comes from a violation of § 2250, which punishes convicted sex offenders *who travel in interstate commerce after the enactment of SORNA* * * *." *Id.* at 920 (emphasis added). The government has since conceded, and the Eighth Circuit has agreed, that *May*'s dicta is the law of the Eighth Circuit, putting that court squarely in conflict with the Seventh Circuit's decision below. *United States* v. *Hulen*, Nos. 08-2265 & 08-2379, 2009 WL 174951, at *1 (8th Cir. Jan. 27, 2009) (referring to *May* as deciding the question in the Eighth Circuit, and stating that "[t]he government concedes that 'pre-SORNA interstate travel cannot violate SORNA' and that it did not have evidence that either defendant had traveled interstate after the effective date of the statute").[4]

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[4] The Fourth Circuit also came to a conclusion that necessarily conflicts with the Seventh Circuit's opinion below. In *United States* v. *Hatcher*, Nos. 07-4839, 07-5070, 07-4845 & 07-5008, 2009 WL 638964 (4th Cir. Mar. 13, 2009), appellants' underlying offenses and interstate travel both occurred prior to February 28, 2007—the date that the Attorney General adopted the interim rule—and they were indicted after that date. 2009 WL 638964, at *1. The court held that, "as a matter of statutory in-

In addition, there has been an extraordinary volume of litigation on this question in the district courts, leading to a nationwide division of authority.[5] At least 17 district court decisions have concluded that SORNA does not apply to pre-enactment travel,[6]

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terpretation, SORNA's registration requirements did not apply to the Appellants at the time they committed the acts giving rise to their indictments." *Ibid.* Although the Fourth Circuit based its opinion on an interpretation of 42 U.S.C. § 16913(d) rather than § 2250, its ultimate conclusion is that SORNA's criminal penalties do not apply to an individual in petitioner's position. Thus, the Fourth Circuit's holding necessarily conflicts with the decision below.

[5] The numbers in text are based on an April 15, 2009, Westlaw search of the term "SORNA" in the "District Court Cases" database. Cases not appearing in the Westlaw database on this date are not included in the total count and not listed here. Thus, these numbers undoubtedly represent only a subset of all relevant cases.

[6] *United States* v. *Chatterson*, No. 2:08-cr-144-FtM-99DNF, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009); *United States* v. *Hardy*, No. 07-mj-108-FHM, 2008 WL 5070945 (N.D. Okla. Nov. 21, 2008) (granting motion to reconsider in light of *Husted*); *United States* v. *Slater*, No. MO-08-CR-131, 2008 WL 4368581 (W.D. Tex. Sept. 16, 2008) (dicta); *United States* v. *Young*, 582 F. Supp. 2d 846 (W.D. Tex. 2008) (dicta); *United States* v. *Natividad-Garcia*, 560 F. Supp. 2d 561 (W.D. Tex. 2008); *United States* v. *Giliette*, 553 F. Supp. 2d 524 (D.V.I. 2008); *United States* v. *Kent*, No. 07-00226-CG, 2008 WL 360624 (S.D. Ala. Feb. 8, 2008), called into question by *Dumont*; *United States* v. *Howell*, No. CR07-2013-MWB, 2008 WL 313200 (N.D. Iowa Feb. 1, 2008); *United States* v. *Terwilliger*, No. 07CR1254 BTM, 2008 WL 50075 (S.D. Cal. Jan. 3, 2008); *United States* v. *Bonner*, No. 07-00264-KD, 2007 WL 4372887 (S.D. Ala. Dec. 11, 2007), called into question by *Dumont*; *United States* v. *Mantia*, No. 07-60041, 2007 WL 4730120 (W.D. La. Dec. 10, 2007); *United States* v. *Rich*, No. 07-00274-01-CR-W-HFS, 2007 WL 4292394 (W.D. Mo. Dec. 5, 2007); *United States* v. *Wilson*, No. 2:06-cr-867 TC, 2007 WL 3046290 (D. Utah Oct. 16, 2007); *United States* v. *Deese*, No. CR-07-167-L, 2007 WL 2778362 (W.D.

Okla. Sept. 21, 2007); *United States* v. *Sallee*, No. CR-07-152-L, 2007 WL 3283739 (W.D. Okla. Aug. 13, 2007); *United States* v. *Bobby Smith*, 481 F. Supp. 2d 846 (E.D. Mich. 2007). In addition, at least seven district courts have found that retroactive application of SORNA would violate the Ex Post Facto Clause. See cases cited *infra* note 12.

The district courts are equally confused about SORNA's applicability to travel in the period between the statute's enactment and the Attorney General's promulgation of the interim rule ("gap" travel). The list of cases above includes cases where the defendant travelled in the "gap" period, as any court that finds that SORNA does not apply to "gap" travel would necessarily come to the same conclusion regarding pre-enactment travel. In fact, the language of such holdings almost always encompasses both "gap" and pre-enactment travel. See, *e.g.*, *Natividad-Garcia*, 560 F. Supp. 2d at 570 ("[U]se of the present tense 'travels' shows that Congress did not intend for sex offenders to be prosecuted based on travel done before SORNA was made retroactive."); *Mantia*, 2007 WL 4730120, at *5 ("Clearly, Congress, in enacting § 2250, used the present tense 'travels' rather than the past-tense 'traveled' or past-participle 'has traveled.'").

On the other hand, at least 20 district court decisions have held that the Act does apply to "gap" travel. See *United States* v. *Stevens*, 578 F. Supp. 2d 172 (D. Me. 2008); *United States* v. *Elmers*, No. 08-20033-01-KHV, 2008 WL 4369310 (D. Kan. Sept. 23, 2008); *United States* v. *Fuller*, No. 5:07-CR-462 (FJS), 2008 WL 4240485 (N.D.N.Y. Sept. 12, 2008); *United States* v. *Gagnon*, 574 F. Supp. 2d 172 (D. Me. 2008); *United States* v. *Zuniga*, No. 4:07CR3156, 2008 WL 2184118 (D. Neb. May 23, 2008); *United States* v. *Cardenas*, No. 07-80108-CR, 2008 WL 896206 (S.D. Fla. Mar. 31, 2008); *United States* v. *Samuels*, 543 F. Supp. 2d 669 (E.D. Ky. 2008); *United States* v. *LeTourneau*, 534 F. Supp. 2d 718 (S.D. Tex. 2008); *United States* v. *Elliott*, No. 07-14059-CR, 2007 WL 4365599 (S.D. Fla. Dec. 13, 2007); *United States* v. *Gould*, 526 F. Supp. 2d 538 (D. Md. 2007); *United States* v. *Ambert*, No. 4:07-CR-053-SPM, 2007 WL 2949476 (N.D. Fla. Oct. 10, 2007); *United States* v. *Beasley*, No. 1:07-CR-115-TCB, 2007 WL 3489999 (N.D. Ga. Oct. 10, 2007); *United States* v. *May*, Nos. 4:07-cr-00164-JEG, 1:07-cr-00059-JEG, 2007 WL 2790388 (S.D. Iowa Sept. 24, 2007); *United*

while 13 district court decisions have concluded that it does (although some were overruled in light of *Hulen*).[7] It is worth noting that the government ei-

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States v. *Mitchell*, No. 07CR20012, 2007 WL 2609784 (W.D. Ark. Sept. 6, 2007); *United States* v. *Sawn*, No. 6:07cr00020, 2007 WL 2344980 (W.D. Va. Aug. 15, 2007); *United States* v. *Gonzales*, No. 5:07cr27-RS, 2007 WL 2298004 (N.D. Fla. Aug. 9, 2007); *United States* v. *Marcantonio*, No. 07-60011, 2007 WL 2230773 (W.D. Ark. July 31, 2007); *United States* v. *Roberts*, No. 6:07-CR-70031, 2007 WL 2155750 (W.D. Va. July 27, 2007); *United States* v. *Mason*, 510 F. Supp. 2d 923 (M.D. Fla. 2007); *United States* v. *Hinen*, 487 F. Supp. 2d 747 (W.D. Va. 2007). It is often unclear whether a court applying SORNA to "gap" travel would come to the same conclusion with regard to pre-enactment travel. See, *e.g.*, *Elmers*, 2008 WL 4369310 at *5 (holding that "any travel in interstate commerce after the effective date of SORNA (July 26, 2006) is covered by the express language of Section 2250," which suggests that this court would have held that SORNA *does not* apply to pre-enactment travel).

Finally, the courts of appeals also disagree about SORNA's applicability to "gap" travel. The Sixth, Eighth, Tenth, and Eleventh Circuits have held that SORNA applies to travel in the "gap" period, while the Fourth Circuit has reached the opposite conclusion. Compare *United States* v. *Samuels*, No. 08-5537, 2009 WL 877698 (6th Cir. Apr. 2, 2009); *Dumont*, 555 F.3d 1288 (11th Cir. 2009); *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008); *United States* v. *Lawrance*, 548 F.3d 1329 (10th Cir. 2008); with *Hatcher*, 560 F.3d 222 (4th Cir. 2009).

[7] *United States* v. *Nam Van Hoang*, No. 07-267-FJP-SCR, 2008 WL 4610249 (M.D. La. Oct. 16, 2008); *United States* v. *Akers*, No. 3:07-CR-00086(01)RM, 2008 WL 914493 (N.D. Ind. Apr. 3, 2008); *United States* v. *Dixon*, No. 3:07-CR-72(01) RM, 2007 WL 4553720 (N.D. Ind. Dec. 18, 2007), rev'd on other grounds, App., *infra*, 1a-13a; *United States* v. *Adkins*, No. 1:07-CR-59, 2007 WL 4335457 (N.D. Ind. Dec. 7, 2007); *United States* v. *Pitts*, No. 07-157-A, 2007 WL 3353423 (M.D. La. Nov. 7, 2007); *United States* v. *Carr*, No. 1:07-CR-73, 2007 WL 3256600 (N.D. Ind. Nov. 2, 2007), aff'd, App., *infra*, 1a-13a; *United States* v. *Bennett*, No. 07CR20040, 2007 WL 2461696 (W.D. Ark. Aug. 27, 2007), overruled by *Hulen*, 2009 WL 174951; *United States* v.

ther failed to appeal or withdrew its appeal in *all* of the cases in which it lost on this question, which gives every appearance that the government is concerned about the strength of its position or is attempting to avoid additional losses at the appellate level. But whatever the government's reasoning on this score, the Court should cure this lack of uniformity.

B. The Seventh Circuit's Construction Of Section 2250(a) Is Wrong.

The need for review is particularly acute because the Seventh Circuit's analysis is wrong. In the decision below, the Seventh Circuit rejected a plain-meaning interpretation of the statute, instead holding that the tense of the word "travels" is not dispositive and that SORNA does not require the defendant's travel to postdate enactment. App., *infra*, 5a-6a. The court further reasoned that § 2250(a)(2)(B) is simply a jurisdictional hook and that the word "travels" therefore should not be read to "create a temporal requirement." *Id.* at 6a. Finally, the court rejected any invocation of the presumption against retroactivity. *Ibid.* But none of this reasoning withstands scrutiny.

Torres, No. 07-50035, 2007 WL 2343884 (W.D. Ark. Aug. 15, 2007), overruled by *Hulen*; *United States* v. *Hulen*, No. 07-30004, 2007 WL 2343885 (W.D. Ark. Aug. 15, 2007), rev'd, 2009 WL 174951; *United States* v. *Markel*, No. 06-20004, 2007 WL 1100416 (W.D. Ark. Apr. 11, 2007), overruled by *Hulen*; *United States* v. *Manning*, No. 06-20055, 2007 WL 624037 (W.D. Ark. Feb. 23, 2007), overruled by *Hulen*; *United States* v. *Templeton*, No. CR-06-291-M, 2007 WL 445481 (W.D. Okla. Feb. 7, 2007), overruled by *Husted*, 545 F.3d 1240; *United States* v. *Madera*, 474 F. Supp. 2d 1257 (M.D. Fla. 2007), rev'd on other grounds, 528 F.3d 852 (11th Cir. 2008).

The plain language of the statute limits applicability to offenders who travel in interstate commerce after SORNA's enactment. Even if it were appropriate to look beyond the unambiguous language of the statute, the policy underlying SORNA does not support the conclusion that the "travels" requirement should be applied retroactively. Finally, the court of appeals disregarded the presumption against retroactivity, the constitutional avoidance canon, and the rule of lenity.

1. Plain Meaning

Statutory interpretation begins, of course, with the language of the statute; where the language is clear, courts need look no further. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058 (2009). In construing a statute, "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin* v. *United States*, 444 U.S. 37, 42 (1979).

The Seventh Circuit disregarded that rule here. Congress chose to use the present tense of the word "travels" in § 2250(a)(2)(B). One need not look to a dictionary to understand that the common understanding of that word implies present or future action. "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). The Seventh Circuit's reading presumes "that Congress chose a surprisingly indirect route to convey an important and easily expressed message" concerning § 2250(a)(2)(B)'s retroactivity. *Landgraf* v. *USI Film Products*, 511 U.S. 244, 262 (1994).

Congress could easily have made the travel element retroactive by using the past tense ("traveled")

or present perfect tense ("has traveled"), but it chose not to do so. And this omission is especially significant when considered in conjunction with language in SORNA specifically addressing the statute's retroactive application to offenses (as opposed to travel) that predate the enactment of SORNA. See 42 U.S.C. § 16913(d). The Act expressly delegates authority to the Attorney General to determine whether the requirements of the Act should be made applicable to offenses committed before the enactment of the statute. But no such delegation was included authorizing the Attorney General (or anyone else) to determine whether the Act could apply to travel that occurred before the enactment of the statute. When Congress wanted to make a provision of SORNA retroactive, it did so explicitly. Thus, the Seventh Circuit was wrong when it reasoned that "the statute does not require that the defendant's travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it." App., *infra*, 4a. In fact, that is precisely what the statute requires.

The Seventh Circuit based its disregard for the plain meaning of the statute, in part, on the view that "subsection (a)(2)(B) is designed to establish a constitutional predicate for the statute * * * rather than to create a temporal requirement." App., *infra*, 6a. But this reasoning is flawed in two respects. First, the Seventh Circuit provides no support for its view that the plain language of the statute may be ignored when a provision serves as a constitutional predicate. If anything, one might expect Congress to be especially careful when crafting language that will bear on the constitutionality of the legislation.

Second, while § 2250(a)(2)(B) is certainly a hook on which Congress rested federal jurisdiction, it is *also* an element of the crime of failing to register under SORNA. See *Husted*, 545 F.3d at 1246 ("At argument, the government conceded that interstate travel is an element of the failure to register offense under 18 U.S.C. § 2250."). To the extent that a distinction between a constitutional predicate and an element of the crime matters in statutory construction, the provision at issue here serves both purposes. There accordingly is every reason to apply in this case the "cardinal canon" of statutory construction and presume that Congress "says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992).

2. Congressional Purpose

Rather than look to the statutory language, the court below relied on what it thought to be the policy underlying SORNA. But as the Tenth Circuit explained in *Husted*, a "broad purpose cannot create ambiguity in a separate, specific portion of the statute where ambiguity does not otherwise exist. Such a reading would contravene the axiom that a specific provision controls over a general one." 545 F.3d at 1246; see, *e.g.*, *Jefferson County* v. *Acker*, 527 U.S. 423, 434 (1999).

Moreover, even disregarding the statutory language, the Seventh Circuit misunderstood Congress's interest in enacting SORNA. The court reasoned:

> The evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unpro-

> tected. * * * The concern is as acute in a case in which the offender moved before the Act was passed as in one in which he moved afterward.

App., *infra*, 4a. As a justification for the holding below, however, this reasoning is insupportable. Although there is no question that Congress intended to create a "comprehensive national system for the registration of [sex] offenders," 42 U.S.C. § 16901, there are two reasons why this general purpose is consistent with a prospective reading of § 2250(a)(2)(B), and is certainly not sufficient to disregard the plain language of that subsection.

First, Congress may have intended to bring as many sex offenders as possible within SORNA's ambit and, at the same time, still have been concerned with potential constitutional problems were it to apply § 2250 to pre-enactment travel. There is no inconsistency between these two positions, and it is in fact the most logical reading of § 2250. See *United States* v. *Hinckley*, 550 F.3d 926, 944 n.3 (10th Cir. 2008) (Gorsuch, J., concurring) ("The requirement that an offender travel in interstate commerce after the Act's effective date is plainly designed to ensure consistency with the Constitution—both with respect to Congress's power to legislate under the Commerce Clause as well as the prohibition against ex post facto laws. Congress desired SORNA to be both comprehensive *and* constitutional."). As this Court has explained (*Landgraf*, 511 U.S. at 285-286):

> It will frequently be true * * * that retroactive application of a new statute would vindicate its purpose more fully. * * * Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment

> may require adopting means other than those that would most effectively pursue the main goal. A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute.

Second, limiting the applicability of § 2250(a)(2)(B) to post-enactment travel does not frustrate the overall intent of Congress. The purpose of SORNA is to create "a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. § 16901; see also 73 Fed. Reg. 38,030, 38,045 (July 2, 2008) ("Congress concluded that the patchwork of standards that had resulted from piecemeal amendments should be replaced with a comprehensive new set of standards"). SORNA accomplishes this goal in a myriad of ways wholly apart from the criminal provisions of § 2250 that are unaffected by whether § 2250(a)(2)(B) applies retrospectively rather than prospectively.

For example, SORNA requires each jurisdiction to maintain a registry consistent with the requirements of the Act, 42 U.S.C. § 16912, and make registry information available to the public via the Internet, as well as to ensure compatibility with a national public website, 42 U.S.C. § 16918. The statute also provides for the creation of a National Sex Offender Registry maintained at the FBI, 42 U.S.C. § 16919, and the aforementioned national website, 42 U.S.C. § 16920. SORNA ensures the sharing of information between jurisdictions by requiring each to report changes in its registry to the national registry, as well as to each other jurisdiction to which the information is directly relevant. 42 U.S.C. § 16921. Any jurisdiction that fails to comply with these re-

quirements faces the loss of a portion of its federal crime-control funding. 42 U.S.C. § 16925.

Furthermore, Congress's decision to make § 2250(a)(2)(B) prospective is understandable when one considers the other existing enforcement mechanisms acting on individual sex offenders who are beyond the reach of SORNA's criminal penalties because their last interstate travel predated enactment. This class of offenders is still subject to state laws requiring registration. See *Smith* v. *Doe*, 538 U.S. 84, 90 (2003) (explaining that every State and the District of Columbia adopted a sex offender registration law by 1996). States will be better able to enforce these laws under the information-sharing regime created by SORNA, as fewer offenders will fall through the cracks. In addition, SORNA requires States to establish a criminal penalty with a maximum term of imprisonment of more than one year for individuals failing to register as required by the Act. 42 U.S.C. § 16913(e).[8]

Finally, the Wetterling Act remains in effect until at least July 2009.[9] SORNA § 129(b). The Wetterling Act provides for a penalty of up to one-year imprisonment for a first offense of failing to register, and up to 10 years for a second offense. 42 U.S.C.

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[8] This section applies to all sex offenders who fail to register, and is not subject to the interstate travel limitation of § 2250 (or any other federal jurisdictional hook).

[9] The date of repeal of the Wetterling Act is based on the deadline for jurisdictions to implement SORNA, described in 42 U.S.C. § 16924. This deadline may be extended in many jurisdictions, as States have been slow to comply with SORNA's requirements. See Abby Goodnough & Monica Davey, *Effort to Track Sex Offenders Draws Resistance From States*, N.Y. Times (Feb. 9, 2009), at A1.

§ 14072(i)(4). Therefore, in light of the existing individual enforcement mechanisms, Congress seems to have made a reasonable calculation that the marginal cost of making § 2250(a)(2)(B) retroactive (in the form of risk that the provision would be held unconstitutional if made retroactive) outweighed the marginal benefit.

3. The Presumption Against Retroactivity, The Constitutional Avoidance Doctrine, And The Rule Of Lenity

In holding that interstate travel pre-dating SORNA's enactment is made criminal by § 2250(a)(2)(B), the Seventh Circuit ignored three additional principles of statutory construction. First, the court failed to adhere to the rule requiring a clear statement from Congress before applying a statute retroactively. Second, by failing to adhere to the presumption against retroactivity, the Seventh Circuit was required to decide important constitutional issues that it need not have addressed, in violation of the constitutional avoidance canon. Finally, even if the court below were correct in determining that the statutory language is ambiguous, the rule of lenity should have led to a result in petitioner's favor.

First, the presumption against applying a statute retroactively "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have the opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf*, 511 U.S. at 265 (internal footnotes omitted). This presumption is embodied in several provisions of the Constitution, including

the Ex Post Facto and Due Process Clauses. See *id.* at 266.[10]

The Court accordingly has required that "Congress first make its intention clear [to help] ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268; see also *id.* at 272-273; *I.N.S.* v. *St. Cyr*, 533 U.S. 289, 315-316 (2001). Therefore, "[a] statute may not be applied retroactively * * * absent a clear indication from Congress that it intended such a result. * * * The standard for finding such unambiguous direction is a demanding one." *St. Cyr*, 533 U.S. at 316; see also *Landgraf*, 511 U.S. at 286-288 (Scalia, J., concurring) ("clear statement" must appear in the text of the statute itself); *United States* v. *Sec. Indus. Bank*, 459 U.S. 70, 79-80 (1982) ("'The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.'") (quoting *United States Fidelity & Guaranty Co.* v. *Struthers Wells Co.*, 209 U.S. 306, 314 (1908)).

In the case of § 2250(a)(2)(B), there is no indication from Congress remotely sufficient to overcome this strong presumption against retroactivity. As we have explained, the plain language of the statute suggests that it was meant to be prospective, and this is not contradicted by the policy underlying the Act. See *Husted*, 545 F.3d at 1247 ("the legislative history [of SORNA] is not sufficiently clear to pre-

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[10] "Even when the conduct in question is morally reprehensible or illegal, a degree of unfairness is inherent whenever the law imposes additional burdens based on conduct that occurred in the past." *Landgraf*, 511 U.S. at 282-283 n.35.

clude the effect of" the "longstanding canon" against retroactivity).

Second, in rejecting the presumption against retroactivity and applying § 2250(a)(2)(B) retroactively, the Seventh Circuit's decision necessarily raises the constitutional concerns that justify the presumption in the first place. See *Landgraf*, 511 U.S. at 267-268 n.21. Thus, the Seventh Circuit failed to apply the doctrine of constitutional avoidance, a "cardinal principle" of statutory construction. *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). By interpreting SORNA to apply to pre-enactment travel, the court below was required to resolve important constitutional issues that it need not have addressed. Indeed, as we describe in more detail below, numerous federal district courts have held that retroactive application of the SORNA travel element violates the Ex Post Facto Clause.

This Court has explained that,

> where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress. * * * "[T]he elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

DeBartolo, 485 U.S. at 575 (quoting *Hooper* v. *California*, 155 U.S. 648, 657 (1895)); see also *St. Cyr*, 533 U.S. at 299-300. And as other courts have held, there is certainly a reasonable interpretation of SORNA that avoids potential constitutional prob-

lems. The Seventh Circuit should have followed that approach.

Third, the rule of lenity dictates that the court below should have resolved any ambiguity in petitioner's favor. See *United States* v. *R.L.C.*, 503 U.S. 291, 305-306 & n.6 (1992); *United States* v. *Bass*, 404 U.S. 336, 347 (1971). To bypass the rule of lenity in this case, the Seventh Circuit would have had to find that the statute unambiguously requires a retroactive application of § 2250(a)(2)(B). As we have explained, there is no such clear statement in SORNA.

II. THE COURT SHOULD GRANT REVIEW TO DECIDE WHETHER PROSECUTING A PERSON UNDER SECTION 2250(a) WHEN THE UNDERLYING OFFENSE AND TRAVEL IN INTERSTATE COMMERCE BOTH PREDATED SORNA'S ENACTMENT VIOLATES THE EX POST FACTO CLAUSE.

Because the Seventh Circuit decided the question of statutory interpretation as it did, it was required to resolve the important constitutional question whether retroactive application of SORNA's criminal penalties violates the Ex Post Fact Clause. Its decision on that question also warrants review. The district courts are deeply divided on the question—although the government has managed to suppress creation of a conflict in the courts of appeals by failing to appeal in those cases where it has been unsuccessful. Particularly in light of substantial flaws in the Seventh Circuit's constitutional analysis, this Court's guidance on the issue is essential.

A. The Decision Below Conflicts With Decisions Of Other Federal Courts On The Constitutionality Of Convicting A Person Under Section 2250(a) When The Underlying Offense And Travel In Interstate Commerce Both Predated SORNA's Enactment.

As with the statutory construction issue addressed above, the question whether prosecuting pre-enactment travel under SORNA violates the Ex Post Facto Clause has been widely litigated across the Nation and has deeply divided the district courts.[11] At least seven courts, disagreeing with the conclusion of the Seventh Circuit in this case, have concluded that such a retroactive application of SORNA is *not* constitutional.[12] These courts have reasoned

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[11] In addition to the problem that the Seventh Circuit's interpretation renders SORNA unconstitutional under the Ex Post Facto Clause, several district courts have also found that SORNA exceeds Congress' power under the Commerce Clause. See, *e.g.*, *United States* v. *Guzman*, 582 F. Supp. 2d 305 (N.D.N.Y. 2008), appeal docketed, No. 08-5561 (2d Cir. Mar. 27, 2009); *United States* v. *Hilton-Thomas*, No. 08-20721-CR, 2009 WL 89280 (S.D. Fla. Jan. 13, 2009), overruled by *Ambert*, 2009 WL 564677; *United States* v. *Waybright*, 561 F. Supp. 2d 1154 (D. Mont. 2008).

[12] *United States* v. *Nugent*, No. 07-5056-01-CRSW-GAF, 2008 WL 413273 (W.D. Mo. Feb. 13, 2008) (dicta); *United States* v. *Davis*, No. 07-60003, 2008 WL 510599 (W.D. La. Jan. 22, 2008); *United States* v. *Patterson*, No. 8:07CR159, 2007 WL 3376732 (D. Neb. Nov. 8, 2007); *United States* v. *Gill*, 520 F. Supp. 2d 1341 (D. Utah 2007); *United States* v. *Cole*, No. 07-cr-30062-DRH, 2007 WL 2714111 (S.D. Ill. Sept. 17, 2007), overruled by *Dixon*, App., *infra*, 1a-13a; *United States* v. *Stinson*, 507 F. Supp. 2d 560 (S.D. W. Va. 2007); *United States* v. *Muzio*, No. 4:07CR179 CDP, 2007 WL 2159462 (E.D. Mo. July 26, 2007). In addition, many of the 17 district court decisions holding that

that SORNA "violates the Ex Post Facto Clause because it increases the penalty, from 1 year to 10 years, for a first offender defendant who travels in interstate commerce prior to [its enactment]." *United States* v. *Bobby Smith*, 481 F. Supp. 2d 846, 853 (E.D. Mich. 2007). In each of these cases, the United States has either declined to appeal or withdrawn its appeal prior to an appellate decision. On the other hand, at least 14 district courts have reached the opposite conclusion, holding that retroactive application of SORNA is consistent with the Clause. See cases cited *supra* note 7; see also *United States* v. *Kelton*, No. 5:07-cr-30-Oc-10GRJ, 2007 WL 2572204 (M.D. Fla. Sept. 5, 2007).

This important question is ripe for consideration by this Court. Although a conflict in the circuits has not yet developed on the point, that is substantially attributable to the government's reluctance to appeal the decisions in which it has lost. Because the question is an important one that has been widely litigated and has generated considerable disagreement —and because there is no prospect that this confusion will be dispelled absent intervention by this Court—further review is warranted.

SORNA does not apply to pre-enactment or gap travel on statutory construction grounds also state that to hold otherwise would raise serious ex post facto concerns. See, *e.g.*, *Bobby Smith*, 481 F. Supp. 2d 846; see also cases cited *supra* note 6.

B. The Seventh Circuit's Ex Post Facto Analysis Is Wrong.

1. As Interpreted By The Seventh Circuit, SORNA Violates The Ex Post Facto Clause.

Because the application of SORNA to persons who traveled in interstate commerce prior to enactment "aggravates" petitioner's crime and "makes it greater than it was, when committed," that use of the statute violates the Ex Post Facto Clause. *Calder* v. *Bull*, 3 U.S. 386, 390 (1798). It is a long-settled principle that "[l]egislatures may not retroactively * * * increase the punishment for criminal acts." *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990). But SORNA's criminal sanctions are harsher than those to which petitioner was subject at the time of his criminal conduct.

Petitioner's failure to register when he moved to Indiana was a crime under the Wetterling Act in effect at that time. But the maximum punishment to which an unregistered offender is subject under SORNA is a full order of magnitude greater than the punishment to which petitioner was subject at the time of his failure to register. Under the Wetterling Act, a first offender such as petitioner may be "imprisoned for not more than 1 year." 42 U.S.C. § 14072(i)(4). In contrast, SORNA's ten-year maximum sentence (and the 37-month sentence petitioner actually received) constitutes a dramatically "increase[d] punishment beyond what was prescribed when the crime was consummated." *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981). Because retroactive application of SORNA "changes the legal consequences of acts completed before its effective date," the Ex Post Facto Clause prohibits the prosecution in this

case. *Id.* at 31; see also *Youngblood*, 497 U.S. at 46 ("[T]he constitutional prohibition is addressed to laws, 'whatever their form,' which * * * alter the nature of the offense, or increase the punishment.").

2. Failure To Register Under SORNA Is Not A Continuing Offense Under The Ex Post Facto Clause.

Although there is no doubt that SORNA increases the penalties for acts committed prior to its enactment, the Seventh Circuit held the statute consistent with the Ex Post Facto Clause because the court regarded failure to register as a "continuing offense." App., *infra*, 2a. But that holding disregarded this Court's instruction that "such offenses are not to be implied except in limited circumstances." *United States* v. *Toussie*, 397 U.S. 112, 121 (1970). The Seventh Circuit failed to deploy the textual and purposive analysis that this Court's precedents require.

Toussie instructed that courts should not construe criminal conduct as continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." 397 U.S. at 115. Far from looking to the text and purpose of SORNA, however, the Seventh Circuit simply analogized the unregistered sex offender to an escaped prisoner, who is "guilty of escape * * * as long as he remains at large." App., *infra*, 3a. But this conclusory analogy short-circuits the careful statutory analysis that *Toussie* commands. Because continuing offenses "are not to be implied except in limited circumstances," *Toussie* recognized a presumption against finding such offenses absent explicit language instructing otherwise. 397 U.S. at 121. In

Toussie "a somewhat ambiguous statute" and a government regulation imposing a "continuing duty" were not enough to establish a continuing offense, and SORNA's silence on this issue should similarly be construed as establishing a non-continuing crime. *Id.* at 119, 122.

The common congressional practice of using explicit language to create continuing offenses confirms this conclusion. See, *e.g.*, 22 U.S.C. § 618 (making failure to register as a foreign agent "a continuing offense"); 50 U.S.C. § 856 (making failure to register as a person trained in foreign espionage systems "a continuing offense"); 18 U.S.C. § 3284 (making concealment of debtor assets "a continuing offense"); see also *United States* v. *Del Percio*, 870 F.2d 1090, 1096 (6th Cir. 1989) (finding that the first prong of the *Toussie* test was not satisfied where statutory text did not specifically describe crime as a "continuing offense"). Notwithstanding this regular congressional practice, SORNA includes no such provision. For this reason, SORNA's "explicit language" does not "compel the conclusion" that failure to register is a continuing offense. *Toussie*, 397 U.S. at 115.

Not only does the text fail to support the Seventh Circuit's treatment of failure to register as continuing indefinitely until the offender does register, but "the nature of the crime involved" is not "such that Congress must assuredly have intended that it be treated as a continuing one." *Toussie*, 397 U.S. at 115. The Court held in *Toussie* that "[t]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime." *Id.* at 122. Although the *Toussie* Court addressed registration for the draft rather than for a sex offender database, its conclusion that registration is an "in-

stantaneous event[] and not a continuing process" is squarely applicable here. *Ibid.* Like the defendant in *Toussie*, petitioner committed his offense when he failed to register within a specified period of time. His crime was an "instantaneous event" and should not be construed as continuing years after he failed to comply with the statute's requirements.

This understanding of SORNA's registration requirement comports with the general principle that a statute creates a continuing offense only if it involves "a prolonged course of conduct" rather than a single, discrete act or omission. *United States* v. *Rivera-Ventura*, 72 F.3d 277, 281 (2d Cir. 1995). Numerous courts have applied this principle across a wide range of criminal statutes. Compare *Toussie*, 397 U.S. 112 (failure to register for draft not continuing offense); *United States* v. *Trupin*, 117 F.3d 678 (2d Cir. 1997) (receipt of stolen goods not continuing offense); *United States* v. *Del Percio*, 870 F.2d 1090 (6th Cir. 1989) (failure to submit accurate regulatory compliance information not continuing offense); *United States* v. *Hare*, 618 F.2d 1085 (4th Cir. 1980) (payment of bribe in form of a long-term loan not continuing offense); *State* v. *Anderson*, 669 S.E.2d 793 (N.C. Ct. App. 2008) (receipt of contraband not continuing offense); *State* v. *Saathoff*, 29 P.3d 236 (Alaska 2001) (same); *State* v. *Masino*, 43 So.2d 685 (La. 1949) (negligent homicide not continuing offense) with *United States* v. *Bailey*, 444 U.S. 394 (1980) (ongoing escape from prison is continuing offense); *United States* v. *Berndt*, 530 F.3d 553 (7th Cir. 2008) (ongoing possession of a pipe bomb is continuing offense); *United States* v. *Brazell*, 489 F.3d 666 (5th Cir. 2007) (ongoing failure to pay child support is continuing offense); *United States* v. *Guzman-Bruno*, 27 F.3d 420 (9th Cir. 1994) (alien's ongoing

presence in the United States after deportation order is continuing offense). Taken together, these cases strongly support the proposition that a criminal act or omission that occurs at a specific time—in this case, three business days after petitioner moved to Indiana—does not give rise to a continuing offense.

III. BOTH OF THE QUESTIONS PRESENTED INVOLVE MATTERS OF EXCEPTIONAL IMPORTANCE.

The two questions in this case are of considerable practical import. There has been an enormous volume of federal court litigation over the meaning and constitutionality of SORNA, and the issues addressed in that litigation will continue to arise until this Court resolves them. Such a decision by this Court would significantly reduce the burden on the lower federal courts by conclusively resolving these frequently litigated issues.

Moreover, the issues presented in this case almost certainly affect many thousands of persons who are subject to federal prosecution under SORNA. When SORNA was under consideration in Congress, the House Judiciary Committee reported that "over 100,000 sex offenders, or nearly one-fifth in the Nation are 'missing,' meaning that they have not complied with sex offender registration requirements." H.R. Rep. No. 109-218, at 26 (2005). Untold numbers of persons subject to the SORNA registration requirement traveled across state lines prior to enactment of the statute, and the government continues to aggressively pursue indictments under the statute.

In this context, the conflict and confusion in the lower courts leads to intolerable inconsistency: Identical conduct may result in the imposition of widely

divergent penalties depending upon the circuit, or the district, in which the defendant resides. Such an outcome frustrates the well-established principle of sentencing uniformity in the federal criminal justice system. See *United States* v. *Booker* 543 U.S. 220, 246 (2005). And although the government doubtless has a significant interest in tracking the movement of persons who have committed sex offenses, the conflict of authority in federal courts over SORNA's meaning and constitutionality poses a threat to the effectiveness of the registration system. Review by this Court accordingly is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602

Counsel for Petitioner

APRIL 2009

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 08-1438

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
MARCUS DIXON,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division. No. 3:07 CR 072 – **Robert L. Miller, Jr.**, *Chief Judge.*

No. 08-2008

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
THOMAS CARR,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division. No. 1:07-CR-73 – **Theresa L. Springmann**, *Judge.*

ARGUED OCTOBER 24, 2008 – DECIDED DECEMBER 22, 2008

Before EASTERBROOK, *Chief Judge*, and POSNER and ROVNER, *Circuit Judges*.

POSNER, *Circuit Judge*. We have consolidated for decision the appeals in two cases that raise overlapping issues, primarily under the ex post facto clause of Article I, section 9, of the Constitution.

Both defendants were convicted—Dixon after a bench trial on stipulated facts, Carr after conditionally pleading guilty—of violating the Sex Offender Registration and Notification Act (part of the Adam Walsh Child Protection and Safety Act of 2006), 18 U.S.C. § 2250. The Act, which went into effect on July 27, 2006, imposes criminal penalties on anyone who, being required by the Act to register, being a convicted sex offender under either federal or state law, and traveling in interstate or foreign commerce, knowingly fails to register as a sex offender, unless he can prove that "uncontrollable circumstances" prevented him from doing so. 18 U.S.C. §§ 2250(a), (b)(1). Congress instructed the Attorney General to "specify the applicability of the requirements of [the Act] to sex offenders convicted before [its enactment] or its implementation in a particular jurisdiction" and to "prescribe rules for the registration of any such sex offenders * * * who are unable to comply with" the requirement, also imposed by the Act, of registering before they are released from prison or, if they do not receive a prison sentence, within three days after being sentenced, and furthermore of re-registering within three days after a change of name, residence, employer, or student status. 42 U.S.C. §§ 16913(b), (c), (d).

The Act creates a continuing offense in the sense of an offense that can be committed over a length of time. If the convicted sex offender does not register by the end of the third day after he changes his residence, he has violated the Act, and the violation continues until he does register, just as a prisoner given a two-week furlough is guilty of escape if he does not appear by the end of the two weeks, and thus can be prosecuted immediately but his violation continues as long as he remains at large.

The Attorney General issued an interim regulation on February 28, 2007, that makes the Sex Offender Registration and Notification Act applicable to persons, such as Dixon and Carr, who were convicted of sex offenses before the Act was passed. 72 Fed. Reg. 8896, 28 C.F.R. § 72.3. They were convicted of violating the Act because they did not register in Indiana—to which they had come before the Act was passed—after the issuance of the regulation.

As the reference to "implementation in a particular jurisdiction" indicates, the sex offender is required only to register with the state in which he is a resident, employee, or student, as well as the jurisdiction of his conviction if different from his residence. 42 U.S.C. § 16913(a). Other provisions of the Act establish a system for pooling the information in the state registries to create in effect a national registry. See 42 U.S.C. §§ 16912, 16918-20, 16923-25. Indiana has yet to establish any procedures or protocols for the collection, maintenance, and dissemination of the detailed information required by the Act, and Dixon argues that therefore he could not comply. But recall that the Act requires the Attorney General to "specify the applicability of [its] requirements . . . to sex offenders convicted before . . . its implementa-

tion in a particular jurisdiction," which the Attorney General did in his regulation of February 28, 2007. So Dixon was required by the Act to register with Indiana.

He also argues that he did not violate the Act because he traveled in interstate commerce before the Act was passed. But the statute does not require that the defendant's travel postdate the Act, any more than it requires that the conviction of the sex offense that triggers the registration requirement postdate it. The evil at which it is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected. H.R. Rep. No. 218, 109th Cong., 1st Sess. 23-24, 26 (2005). The concern is as acute in a case in which the offender moved before the Act was passed as in one in which he moved afterward. There is a close analogy to the federal criminal law (currently codified at 18 U.S.C. § 922(g)(1)) that punishes felons who possess guns that have moved in interstate commerce. The danger posed by such a felon is unaffected by when the gun crossed state lines (as the felon-in-possession statute requires in order to be within Congress's power under the commerce clause), and so it need not have crossed after the statute was passed. *Scarborough v. United States*, 431 U.S. 563 (1977).

We would have a different case if the convicted sex offender's interstate travel took place before his conviction. Since the statutory aim is to prevent a convicted sex offender from circumventing registration by leaving the state in which he is registered, it can be argued that the travel must postdate the conviction. It did here, so we need not decide whether it must in every case.

After the appeal in our case was argued, the Tenth Circuit held in *United States v. Husted*, 545 F.3d 1240 (10th Cir. 2008), that the Act punishes only convicted sex offenders who travel in interstate commerce after the Act was passed. It is the only appellate case we have found that decides the question, although *United States v. May*, 535 F.3d 912 (8th Cir. 2008), assumes the same answer as *Husted*. The defendant in *United States v. Madera*, 528 F.3d 852 (11th Cir. 2008), raised the question and the court mentioned it but went on to reverse his conviction on another ground and decided to leave the question open. See *id.* at 857, 859 and n.8.

The only ground that the court in *Husted* gave for its ruling is that the Act uses the present sense of the word "travel"; the Act applies to a convicted sex offender who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. § 2250(a)(2)(B). The court's interpretation creates an inconsistency. The word "resides" does not describe an action, which begins at a definite time, but a status, which may have existed indefinitely. Since the Act applies to a convicted sex offender who "enters or leaves," as well as one who "resides in," Indian country, it is apparent that old residents of Indian country, as well as new entrants, are covered. Thus, on the Tenth Circuit's logic, a sex offender who has resided in Indian country since long before the Act was passed is subject to the Act but not someone who crossed state lines before the Act was passed. That result makes no sense, and gives force to the Supreme Court's remark in *Scarborough*, referring to the analogous case of the felon in possession law, that "Congress' choice of tenses is not very revealing," 431 U.S. at 571, and to the remark in *Coalition for Clean Air v. Southern California Edison*

Co., 971 F.2d 219, 225 (9th Cir. 1992), that "the present tense is commonly used to refer to past, present, and future all at the same time."

The reference to "Indian country" is a tip-off that subsection (a)(2)(B) is designed to establish a constitutional predicate for the statute (just as movement in commerce is the constitutional predicate for the felon in possession law) rather than to create a temporal requirement. Congress has plenary authority over Indian reservations. E.g., *United States v. Kagama*, 118 U.S. 375 (1886).

The Tenth Circuit bolstered its tense-driven interpretation by reference to the policy against interpreting legislation to make it retroactive. But in relation to criminal statutes, that policy is stated in the ex post facto clause, and we shall see that applying the Act to persons who crossed state lines before its enactment does not violate the clause.

We therefore disagree with the Tenth Circuit's interpretation. Because this ruling creates an intercircuit conflict, we have circulated our opinion to the full court before issuing it, as required by Circuit Rule 40(e). There were no votes to hear the case en banc.

The remaining arguments made by Dixon (other than a frivolous argument based on the Administrative Procedure Act) are based on the Constitution. Most of them have no merit, such as his contention (made only at oral argument) that the movement of a person as distinct from a thing across state lines is not "commerce" within the meaning of the Constitution's commerce clause. Dixon's lawyer must in the heat of argument have forgotten the Mann Act, 18 U.S.C. §§ 2421 *et seq.* Likewise without merit is his

argument that for Congress to delegate to an official of the executive branch the authority to fill out the contours of a statute violates the separation of powers. It is commonplace and constitutional for Congress to delegate to executive agencies the fleshing out of criminal statutes by means of regulations. See, e.g., *Touby v. United States*, 500 U.S. 160, 165-69 (1991); *United States v. Arch Trading Co.*, 987 F.2d 1087, 1093-94 (4th Cir. 1993).

Nor did punishing Dixon deny due process of law because he did not receive personal notice of the enactment of the Sex Offender Registration and Notification Act, let alone of the requirements—still not fully specified by the Attorney General—under it. The second half of the argument is just a reprise of Dixon's first statutory argument. The first half runs afoul of cases like *United States v. Wilson*, 159 F.3d 280, 288-89 (7th Cir. 1998), which explain that it is not a defense to a criminal prosecution that the defendant had never heard of the statute under which he is being prosecuted. See also *United States v. Mitchell*, 209 F.3d 319, 322-24 (4th Cir. 2000); *United States v. Reddick*, 203 F.3d 767, 769-71 (10th Cir. 2000). Dixon cites *Lambert v. California*, 355 U.S. 225 (1957), which held (a holding the authority of which is undermined, however, by the Court's remarks in *Texaco, Inc. v. Short*, 454 U.S. 516, 537-38 n.33 (1982)) that a city ordinance which required felons to register was a denial of due process because the "violation of its provisions is unaccompanied by any activity whatever, mere presence in the city being the test. Moreover, *circumstances which might move one to inquire as to the necessity of registration are completely lacking.*" 325 U.S. at 229 (emphasis added). In our case those circumstances are present. Dixon had had to register as a sex offender in South

Carolina and would have known that he would have to do the same in Indiana; for each time he registered in South Carolina, he signed a form that said he "must send written notice of a change of address to a new state to the Sheriff of the county where [he] formerly resided and must register with the appropriate official in the new state."

Dixon has one good argument, however, and that is that his conviction for failing to register violated the Constitution's ex post facto clause. This is part of the original Constitution, not the Bill of Rights, and is foundational of liberty. *Marks v. United States*, 430 U.S. 188, 191-92 (1977). It both enforces the principle that legislation is prospective, whereas punishment—the job assigned by the Constitution to the judicial branch—is retrospective, and gives people a minimal sense of control over their lives by guaranteeing that as long as they avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered.

Dixon does not, and in light of *Smith v. Doe*, 538 U.S. 84 (2003), could not successfully, challenge the registration requirement itself as an ex post facto law. The requirement is regulatory rather than punitive. His argument is that all the conduct for which he was punished, not merely the sex crimes and the travel and the change of residence, occurred before the Sex Offender Registration and Notification Act was made applicable to him by the Attorney General's regulation.

If all the acts required for punishment are committed before the criminal statute punishing the acts takes effect, there is nothing the actor can do to avoid violating the statute, and the twin purposes of the ex post facto clause are engaged. But by the same

token as long as at least one of the acts took place later, the clause does not apply. *United States v. Campanale*, 518 F.2d 352, 364-65 (9th Cir. 1975); *United States v. Brown*, 555 F.2d 407, 416-17 (5th Cir. 1977). For in that case the defendant cannot be punished without a judicial determination that he committed an act after the statute under which he is being prosecuted was passed, and by not committing that act (provided of course that it is a voluntary act and so can be avoided by an exercise of volition) he would have avoided violating the new law.

Laws increasing the punishment for repeating an offense (or punishing the continuation of conduct begun before the law was passed) illustrate our point. They do not violate the ex post facto clause because even if the law was passed after the defendant committed his first offense and increases the punishment for a repeat offense, the defendant can avoid the increased punishment by not repeating (and so not being determined by a court to have repeated) the offense. *McDonald v. Massachusetts*, 180 U.S. 311, 312-13 (1901); *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *United States v. Washington*, 109 F.3d 335, 337-38 (7th Cir. 1997); *United States v. Rasco*, 123 F.3d 222, 227 (5th Cir. 1997); *United States v. Brady*, 26 F.3d 282, 290-91 (2d Cir. 1994). Thus the fact that elements of Dixon's crime occurred before the Sex Offender Registration and Notification Act was made applicable to him does not make the application of the Act to his failure to register violate the ex post facto clause. The critical question concerns the third element of a violation of the Act, the failure to register.

The Act was made applicable to persons in Dixon's situation – persons convicted of sex offenses

before the Act went into effect—by the regulation issued by the Attorney General on February 28, 2007. The regulation just says that such persons have to register. It doesn't say by when. By analogy to contract offers that do not specify a deadline for acceptance, we can assume that they would have to register within a reasonable time, *Burton v. United States*, 202 U.S. 344, 384-86 (1906) (applying the contract principle in a criminal case); see, e.g., *Chicago Tribune Co. v. NLRB*, 965 F.2d 244, 248-249 (7th Cir. 1992); *Vogel v. Melish*, 203 N.E.2d 411, 413 (1964); *Family Video Movie Club, Inc. v. Home Folks, Inc.*, 827 N.E.2d 582, 586 (Ind. App. 2005); E. Allan Farnsworth, *Contracts* § 3.19, p. 157 (4th ed. 2004), unless the defendant could prove that uncontrollable circumstances prevented him from registering-for example if he were in a coma when the otherwise reasonable time for registering expired.

The indictment charges Dixon with having failed to register "from on or about February 28, 2007 to on or about April 5, 2007." There is nothing in the trial transcript or elsewhere in the record to indicate precisely when he failed to register. The natural reading of the indictment is that he didn't register before April 5 or thereabouts, at the earliest, but that is just the charge and there is no evidence. It would hardly be reasonable to require that he have registered no later than February 28, since that was the day on which the interim regulation, subjecting him to the Act, was issued. So far as the record reveals, not only his conviction of a sex offense and his travel in interstate commerce, but his failure to register as well, occurred before the Act took effect with respect to the class of offenders to which he belongs, if as we believe the Act requires registration not on the day the Act went into effect or a regulation by the Attorney

General made the Act applicable to a defendant, but within a reasonable time after that.

It is true that Indiana law required Dixon to register as a sex offender when he moved to Indiana. Ind. Code §§ 11-8-8-7(a)-(e), (g), § 11-8-8-17(a). So in a sense (though a loose one, because the federal Act requires more than the Indiana one—with the sections of that Act just cited, compare 42 U.S.C. § 16913), the federal Act just ordered him to do what he was required to do anyway. But it did more: it created a federal criminal penalty on top of the state criminal penalty for failure to register. The ex post facto clause is violated when the government rather than creating a new crime increases the penalty for an existing one. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798); *Dobbert v. Florida*, 432 U.S. 282, 292-93, (1977); *Prater v. U.S. Parole Commission*, 802 F.2d 948, 952-53 (7th Cir. 1986); *United States v. Terzado-Madruga*, 897 F.2d 1099, 1124 (11th Cir. 1990).

An alternative analysis, which brings us to the same point however, harks back to our earlier discussion of fair notice. Concern with due process gives rise to the question "how a legislature must go about advising its citizens of actions that must be taken to avoid a valid rule of law," and "the answer to this question is no different from that posed for any legislative enactment affecting substantial rights. Generally, a legislature need do nothing more than enact and publish the law, and afford the citizenry a reasonable opportunity to familiarize itself with its terms and to comply." *Texaco, Inc. v. Short*, *supra*, 454 U.S. at 531-32; see *Jones v. United States*, 121 F.3d 1327, 1328-30 (9th Cir. 1997). The close relation between the concern with providing that opportunity and the concern that animates the ex post facto

clause was remarked by Justice Stevens in a concurring opinion in *Hodel v. Irving*, 481 U.S. 704, 733 n.18 (1987): "A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation." Whatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero. An analogy can be drawn to *Bouie v. City of Columbia*, 378 U.S. 347 (1964), where the Supreme Court held that "an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates precisely like an ex post facto law." *Id.* at 353.

Carr's case, to which we now turn, is simpler than Dixon's. Although his interstate travel like Dixon's preceded the application of the Sex Offender Registration and Notification Act to him, and although he assumes (as Dixon argues) that the Act requires that the travel postdate that application, the only ground of his appeal is that his conviction violated the ex post facto clause. But he does not and cannot complain that he was not given enough time to register in Indiana in order to avoid violating the Act, because he admits that he had still failed to do so "on or about July, 2007," almost five months after the Attorney General's regulation was issued that made the statute applicable to him. Five months is a sufficient grace period. Remember that on our interpretation of the statute as filled out by the regulation, the duty to register does not come into force on the day the Act becomes applicable to a person, or on the next day or next week, but within a reasonable time; and Carr had a reasonable time within which he could have registered. Had he done so, he could

not have been convicted of violating the Act. Since his violation was not complete when the Act became applicable to him, his rights under the ex post facto clause were not violated.

The judgment in Dixon's case is reversed with directions to acquit; the judgment in Carr's case is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF INDIANA, FORT WAYNE DIVISION

UNITED STATES OF AMERICA,
Plaintiff,
v.
THOMAS CARR,
Defendant.

No. 1:07-CR-73

OPINION AND ORDER

THERESA L. SPRINGMANN, United States District Judge.

This matter is before the Court on Defendant Thomas Carr's Motion to Dismiss the Indictment charging him with failure to register as a sex offender.

BACKGROUND

On August 22, 2007, the government filed an Indictment against the Defendant, charging him with a violation of 18 U.S.C. § 2250. The Indictment charged that on or about July 2007, the Defendant, who is a person required to register under the Sex Offender Registration and Notification Act (SORNA), did travel in interstate commerce, and knowingly

failed to register or update a registration as required by that Act.

In 2004, the Defendant was convicted in Alabama of First Degree Sexual Abuse. He was released from custody and, on July 6, 2004, registered with the state of Alabama as a sex offender. In either 2004 or 2005, the Defendant moved to Indiana. On July 19, 2007, the Fort Wayne police became aware that the Defendant was living in Fort Wayne. As of that date, he was not registered as a sex offender in the state of Indiana.[1]

On September 25, 2007, the Defendant moved to dismiss the Indictment on the basis that any conviction under 18 U.S.C. § 2250 would violate the ex post facto clause of the Constitution because he relocated from Alabama to Indiana in 2004 or 2005, before the passage of SORNA in 2006 and before its application to him in February 2007.

On October 10, the government responded to the Defendant's motion. The government argued that the ex post facto clause is only implicated when all of the elements of an offense have been completed before a statute's effective date. The government contends that the offense of failing to register is not completed until a sex offender knowingly fails to register under SORNA, and that a person can only knowingly fail to register under SORNA after it went into effect. The government also argues that a violation of § 2250 is a continuing offense.

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[1] Not all of these facts are presented in the Indictment. They are derived from the parties' briefs on the Defendant's Motion to Dismiss and do not appear to be in dispute.

DISCUSSION

A. Background

On July 27, 2006, the President approved Title I of the Adam Walsh Child Protection and Safety Act of 2006, including the Sex Offender Registration and Notification Act. SORNA generally requires the states to conform their sex offender registration laws to the SORNA requirements at the risk of losing federal funding. SORNA also imposes registration requirements on sex offenders who are subject to federal jurisdiction and makes failure to register as a sex offender subject to a maximum penalty of ten years imprisonment. Prior to SORNA, a 1994 federal law, known as the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, made it a misdemeanor to fail to register under a state sexual offender registration program. 42 U.S.C. § 14072 (i).

The elements for failing to register under § 2250 (a) are that a defendant: (1) was a sex offender as defined under SORNA and, therefore, required to register under SORNA; (2) traveled in interstate commerce; and (3) knowingly failed to register or update a registration as required by SORNA. 18 U.S.C. § 2250(a). SORNA delegated to the Attorney General the authority to determine the applicability of the Act to sex offenders convicted before the enactment of SORNA. On February 16, 2007, the Attorney General promulgated 29 C.F.R. Part 72, an interim rule, extending the provisions of SORNA to sex offenders whose convictions predated SORNA. The regulation was published in the Federal Register on February 28, 2007.

B. Ex Post Facto Clause

The Ex Post Facto Clause of the Constitution prohibits Congress from criminalizing conduct after is has occurred, *Collins* v. *Youngblood*, 497 U.S. 37, 41 (1990), or from increasing the punishment for a crime after it is committed, *Miller* v. *Florida*, 482 U.S. 423, 429 (1987). U.S. Const., Art. I, § 10, cl. 1. This constitutional prohibition has come to apply "only to penal statutes which disadvantage the offender affected by them." *Collins*, 497 U.S. at 41. Therefore, a statute will not violate the ex post facto clause if it is designed to be nonpunitive and regulatory and the plaintiff cannot establish by the clearest proof that the state's choice was excessive in relation to its legitimate regulatory purpose. See *Smith* v. *Doe*, 538 U.S. 84, 92 (2003) (applying well-established framework for determining whether a law constitutes retroactive punishment in violation of the ex post facto clause to Alaska's sex offender registration and notification law). In *Smith*, the Supreme Court concluded that the Alaskan statutes' retroactive application did not violate the ex post facto clause because it was a nonpunitive, civil scheme. 538 U.S. at 105-06.

This Court agrees with those district courts that have analyzed SORNA and found it, like the statute in *Smith*, to be a civil, nonpunitive regime for the purpose of public safety. See *United States v. Gill*, --- F.Supp.2d ----, 2007 WL 3018909, at *3 (D. Utah Oct. 15, 2007) (holding that *Smith's* interpretation of the ex post facto clause was controlling because SORNA's purpose, like the Alaska registration requirement, was not to punish sex offenders but to inform the public about his background); *United States v. Hinen*, 487 F. Supp. 2d 747, 755-57 (W.D. Va.

2007) (finding that Congress's purpose was to establish a comprehensive national system for registration of sex offenders so as to protect the public from sex offenders and offenders against children); *United States v. Madera*, 474 F. Supp. 2d 1257, 1264 (M.D. Fla. 2007) (relying heavily on the Supreme Court's decision in *Smith v. Doe* to conclude that SORNA did not violate the ex post facto clause); *United States v. Mason*, --- F. Supp. 2d ----, 2007 WL 1521515, at *5 (M.D. Fla. May 22, 2007) (finding insufficient evidence to override legislative intent and transform SORNA from a civil scheme into a criminal penalty); *United States v. Manning*, 2007 WL 624037, at *1 (W.D. Ark. Feb. 23, 2007) (concluding that the "retroactivity of the registration law does not violate the ex post facto clause of the Constitution as it is not punitive, but a civil regulatory scheme with no punitive purpose or effect"); *United States v. Templeton*, 2007 WL 445481, *5 (W.D. Okla., Feb. 7, 2007) (using reasoning set forth in *Smith* to conclude that SORNA is nonpunitive, and its retroactive application does not violate the ex post facto clause).[2] Because SORNA is a civil, nonpunitive regime for the purpose of public safety, its application to the Defendant does not implicate the ex post facto clause.

The Court also notes that, even if *Smith v. Doe* does not dispose of the Defendant's ex post facto claim, there is support for the government's argument that the Defendant's failure to register, because it continued beyond the effective date of SORNA, could subject him to the enhanced penalty

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[2] This is a non-exhaustive list of cases that have ruled that SORNA, like the statute considered in *Smith v. Doe*, is not penal.

even if the SORNA's statutory scheme is found to be punitive. In *United States v. Black*, 125 F.3d 454 (7th Cir. 1997), the defendant lodged an ex post facto clause challenge to his prosecution for failing to pay past due child support. The debt arose before the passage of a federal law that imposed punishment on a person who willfully failed to pay past due child support obligations. The defendant argued that, because the debt arose before passage of the law, and because his sons were emancipated when the law was enacted, imposing punishment upon him for failure to pay violated the ex post facto clause. The court held that when the debt arose was not relevant—only that it remained unpaid. 125 F.3d at 466-67. Likewise, it is not relevant that the Defendant's obligation to register began before passage of SORNA. What is relevant is that the Defendant remains unregistered in the state of Indiana after the passage of SORNA.

The Court finds that SORNA is a civil, regulatory statute of the ilk examined in *Smith v. Doe*, and, as such, does not implicate the ex post facto clause. Alternatively, the Defendant is not being held accountable for pre-SORNA conduct. The conduct prohibited by § 2250(a) is the failure to register as a sex offender. The Indictment charges that the Defendant failed to register in July 2007, after the enactment of SORNA.

CONCLUSION

For the foregoing reasons, the Defendant's Motion to Dismiss is **DENIED.**

SO ORDERED on November 2, 2007.

OPPOSITION BRIEF

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
KATHLEEN A. FELTON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on certain sex offenders who fail to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA), applies to petitioner, whose interstate travel occurred after his conviction for a covered sex offense, but before SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes a prosecution under Section 2250(a) of a person whose underlying sex offense and interstate travel predated SORNA's enactment, but whose failure to register occurred substantially after SORNA's requirements became applicable to him.

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In the Supreme Court of the United States

No. 08-1301

THOMAS CARR, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 578. The opinion of the district court (Pet. App. 14a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 22, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted of failing to register or to

update his registration as a sex offender, in violation of 18 U.S.C. 2250(a). He was sentenced to 37 months of imprisonment. The court of appeals affirmed. Pet. App. 1a-13a.

1. On July 27, 2006, Congress enacted the Sex Offender Registration and Notification Act (SORNA or Act), 42 U.S.C. 16901 *et seq.*, which created a new comprehensive national system and set of requirements for sex offender registration.[1] SORNA defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1), (3)-(5) and (7). A sex offender must "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a).

Section 16913 specifies SORNA's registration requirements, which are divided into two categories. First, under Section 16913(b), a sex offender must initially register following his conviction:

> **Initial registration**
>
> The sex offender shall initially register—
>
> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

---

[1] Before SORNA, and following the 1994 enactment of the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, 42 U.S.C. 14071 *et seq.*, all States had sex offender registration and notification programs. See *Smith* v. *Doe*, 538 U.S. 84, 89-90 (2003). SORNA was enacted to strengthen and replace these previously existing standards. See *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8895 (2007).

> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

42 U.S.C. 16913(b). Second, Section 16913(c) requires sex offenders who already have registered to keep their registrations current by updating their registration within three business days of any change in their "name, residence, employment, or student status." 42 U.S.C. 16913(c).

SORNA also delegates to the Attorney General the authority to further specify registration requirements in certain situations:

> **Initial registration of sex offenders unable to comply with subsection (b)**
>
> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, which states that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. The Attorney General explained that "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convic-

tions predate the enactment of SORNA." *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8896 (2007). The interim rule thus served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." *Ibid.*

SORNA also creates a criminal offense for non-registration. Under that provision, a sex offender required to register under SORNA, who, *inter alia*, "travels in interstate or foreign commerce" and "knowingly fails to register or update a registration" as required under the Act may be punished by up to ten years of imprisonment. 18 U.S.C. 2250(a).

2. In 2004, petitioner was convicted of first degree sexual abuse in Alabama. When he was released from custody, petitioner registered in Alabama as a sex offender. In 2004 or 2005, petitioner moved to Indiana. On July 19, 2007, petitioner was discovered living in Fort Wayne, Indiana. As of that date, petitioner had not registered as a sex offender in Indiana. Pet. App. 14a-15a.

3. A federal grand jury charged petitioner with violating 18 U.S.C. 2250(a). Petitioner moved to dismiss the indictment, asserting that "his prosecution and any conviction would violate the Ex Post Facto Clause of the United States Constitution." Mot. to Dismiss 1. The district court rejected petitioner's ex post facto claim and denied his motion to dismiss the indictment. Pet. App. 19a. Petitioner then entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. *Id.* at 2a.

4. a. Petitioner presented a single issue on appeal: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5.

After oral argument, the Seventh Circuit consolidated for decision petitioner's appeal and that of another defendant, Marcus Dixon, whose underlying conduct was unrelated to petitioner's and whose trial court proceedings were conducted before a different judge. See Pet. App. 15a; 08-1438 Docket entry No. 31 (Dec. 22, 2008); 08-2008 Docket entry No. 17 (Dec. 22, 2008). Like petitioner, Dixon argued that his conviction for violating SORNA violated the Ex Post Facto Clause. Pet. App. 2a, 8a-12a. Unlike petitioner, however, Dixon also argued that, as a matter of statutory construction, "he did not violate [SORNA] because he traveled in interstate commerce before [SORNA] was passed." *Id.* at 4a. Cf. *id.* at 12a (stating that "the only ground of [petitioner's] appeal [was] that his conviction violated the ex post facto clause").

b. The court of appeals rejected petitioner's ex post facto claim and affirmed his conviction. Pet. App. 12a-13a. The court explained that the Ex Post Facto Clause is not violated "as long as at least one of the acts" that is "required for punishment" occurred after "the criminal statute punishing the acts takes effect." *Id.* at 8a-9a. The court determined that that standard was satisfied in petitioner's case because, in the court of appeals' view, petitioner had no obligation to register under SORNA until February 28, 2007—the date on which the Attorney General's interim rule was issued and seven months after SORNA took effect.[2] *Id.* at 12a. Petitioner "d[id] not

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[2] The courts of appeals are divided on whether SORNA applied to all previously convicted sex offenders upon enactment or whether sex offenders whose predicate convictions predated SORNA did not become subject to the statute until the Attorney General issued his interim rule. Compare *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (former view), cert. denied, 129 S. Ct. 2431 (2009); and *United*

and c[ould] not complain that he was not given enough time to register in Indiana in order to avoid violating [SORNA]." *Ibid.* To the contrary, petitioner "admitt[ed] that he had still failed to [register] * * * almost five months after" his duty to register first arose. *Ibid.* The court of appeals thus rejected petitioner's ex post facto claim because "his violation was not complete when [SORNA] became applicable to him." *Id.* at 13a.

c. In contrast, the court of appeals reversed Dixon's conviction for violating SORNA and remanded with instructions to enter a judgment of acquittal. Pet. App. 3a-12a.

ii. The court of appeals first rejected Dixon's argument that, as a matter of statutory construction, SORNA is inapplicable to a person whose interstate travel predated the statute's enactment. Pet. App. 4a-6a. The court concluded that SORNA does not "require[] that the conviction of the sex offense that triggers the registration requirement postdate" the statute. *Id.* at 4a. The court also stated that "[t]he evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected," and it noted that this "concern is as acute in a case in

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States v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (same), cert. denied, 129 S. Ct. 2383 (2009), with Pet. App. 3a, 9a-10a (latter view), *United States* v. *Madera*, 528 F.3d 852, 857-859 (11th Cir. 2008) (same), and *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009) (same). This Court recently denied two petitions for a writ of certiorari that sought review of that question. See *Hinckley*, *supra* (No. 08-8696); *May*, *supra* (No. 08-7997). The division of authority about when SORNA first became applicable to sex offenders whose convictions predated the Act is immaterial here, however, because the court of appeals applied the standard that is more favorable to petitioner.

which the offender moved before [SORNA] was passed as in one in which he moved afterward." *Ibid.* (citing H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1 23-24, 26 (2005)). The court of appeals drew an analogy between SORNA and the federal law that prohibits convicted felons from possessing firearms that have traveled in interstate commerce, and it noted that, under that law, there is no requirement that the firearm have moved in interstate commerce after the law was enacted. *Ibid.* (citing *Scarborough* v. *United States*, 431 U.S. 563 (1977)).[3]

The court of appeals noted that the Tenth Circuit had reached a different conclusion, holding that, as a matter of statutory construction, SORNA "punishes only convicted sex offenders who travel in interstate commerce after [SORNA] was passed." Pet. App. 5a (citing *United States* v. *Husted*, 545 F.3d 1240, 1243-1244 (2008)). The court of appeals observed that "[t]he only ground * * * *Husted* gave for its ruling is that [SORNA] uses the present sense of the word 'travel,'" and it determined that *Husted*'s reading "create[d] an inconsistency" within the statute. *Ibid.* SORNA refers "to a convicted sex offender who 'travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country.'" *Ibid.* (quoting 18 U.S.C. 2250(a)(2)(B)). The court of appeals explained that "[t]he word 'resides' does not describe an action, which begins at a definite time, but a status, which may have existed indefinitely." *Ibid.*

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[3] The court of appeals observed that it would be "a different case if the convicted sex offender's interstate travel took place before his conviction" for the predicate sex offense. Pet. App. 4a. The court determined that it need not decide whether SORNA would apply in such a situation, however, because Dixon's interstate travel post-dated his conviction. *Ibid.*

Accordingly, under the Tenth Circuit's reasoning, "a sex offender who has resided in Indian country since long before [SORNA] was passed is subject to [SORNA] but * * * someone who crossed state lines before [SORNA] was passed" is not subject to the statute. *Ibid.* The court of appeals determined that such a result would "make[] no sense, and g[ave] force to the Supreme Court's remark * * * referring to the analogous case of the felon in possession law[] that 'Congress' choice of tenses is not very revealing.'" *Ibid.* (quoting *Scarborough*, 431 U.S. at 571). The court of appeals thus "disagree[d] with the Tenth Circuit's interpretation" and concluded that Subsection (a)(2)(B) "is designed to establish a constitutional predicate for [SORNA's criminal provision] * * * rather than to create a temporal requirement." *Id.* at 6a.

ii. Having rejected Dixon's statutory claim, the court of appeals determined that his conviction violated the Ex Post Facto Clause. Pet. App. 8a-12a. As with petitioner, the court concluded that SORNA did not become applicable to Dixon until February 28, 2007, the date on which the Attorney General promulgated his interim rule. *Id.* at 9a-10a. The court noted that the indictment charged Dixon with failing to register "from on or about February 28, 2007 to on or about April 5, 2007." *Id.* at 10a. The court of appeals determined that, under those circumstances, Dixon's "failure to register * * * occurred before [SORNA] took effect with respect to" him. *Ibid.* The court viewed SORNA as "requir[ing] registration not on the day [SORNA] went into effect or a regulation by the Attorney General made [SORNA] applicable to a defendant, but within a reasonable time after that," *id.* at 10a-11a, and it concluded that the period between February 28, 2007, and April 5,

2007, was too short to permit a criminal prosecution for failure to register, *id.* at 10a-12a.

ARGUMENT

1. Petitioner contends (Pet. 8-25) that, as a matter of statutory construction, SORNA's criminal provision does not apply to a person whose interstate travel preceded SORNA's enactment.[4] That claim does not merit further review.

a. i. Petitioner's statutory claim is not properly before this Court because petitioner never made a statutory argument before either the district court or the court of appeals. Petitioner's motion to dismiss the indictment rested solely on the Ex Post Facto Clause. The motion itself stated that it was "based on Article I[,] Section 9, Clause 3 of the United States Constitution," and that petitioner "contend[ed] that his prosecution and any conviction would violate the Ex Post Facto Clause." Mot. to Dismiss 1. Petitioner's memorandum of law in support of that motion likewise raised only a constitutional claim. It asserted that, because petitioner's "travel in interstate commerce from Alabama to Indiana [occurred] prior to the passage of SORNA[,] * * * any imposition of punishment upon him under that act would be a violation of the ex post facto clause." Pet. Mem. in Supp. of Mot. to Dismiss 2-3; accord Pet. C.A. Br. 6 (stating that petitioner filed with the district court "a Motion to Dismiss and Memorandum of Law arguing that the prosecution * * * was a violation of the Ex Post Facto Clause of the Constitution"). The district court understood petitioner's motion to dismiss

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[4] The same issues presented by this petition for a writ of certiorari also are presented by *Akers* v. *United States*, petition for cert. pending No. 08-10318 (filed May 4, 2009).

as based solely on constitutional grounds, see Pet. App. 15a, and the court's decision denying that motion does not address the statutory issue on which petitioner now seeks this Court's review, see *id.* at 16a-19a.

Before the court of appeals, petitioner likewise made clear that his argument was based exclusively on the Constitution. In his "Statement of Issues Presented for Review," petitioner described the only question before the Seventh Circuit as: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5. The Summary of Argument of petitioner's opening brief read, in its entirety:

> The Court erred in denying [petitioner's] Motion to Dismiss. The prosecution and conviction of [petitioner] are in violation of the Ex Post Facto Clause of the Constitution. Because he relocated from Alabama to Indiana in 2004 and 2005, before the passage of SORNA in 2006 and before its application to him in February 2007, [petitioner's] prosecution violates the Ex Post Facto Clause of the Constitution.

Id. at 8. The Conclusion section of petitioner's opening brief read as follows: "The Court erred in denying [petitioner's] Motion to Dismiss. The prosecution and conviction of [petitioner] under SORNA is a violation of Article I, Section 9, Clause 3 of the United States Constitution." *Id.* at 20; accord Pet. C.A. Reply Br. 2 (Summary of Reply Argument: "[Petitioner] argues that the cases relied upon by the Government do not support its position that the application of 18 U.S.C. § 2250 to [petitioner] does not violate the Ex Post Facto Clause.").

ii. Petitioner asserts briefly that he did "press[] the antecedent statutory interpretation issue" before the court of appeals by "citing numerous district court deci-

sions that avoided the ex post facto issue by resolving the statutory question in defendants' favor." Pet. 6 n.1 (citing Pet. C.A. Br. 16-17). That claim is without merit. Petitioner's court of appeals brief contained a string cite of 12 district court cases that was introduced by the following statement: "There have been a number of district courts which have addressed this issue and found that the statute violates the Ex Post Facto Clause." Pet. C.A. Br. 16. The brief further stated that, in three of those decisions, "the facts were the same as in the present case," because those defendants, like petitioner, "traveled before the enactment of SORNA in July 2006." *Id.* at 16-17. But the conclusion that the brief attributed to those decisions was likewise a constitutional one, *i.e.*, that "application of SORNA [to those defendants] would involve ex post facto considerations." *Id.* at 17.

Petitioner's court of appeals brief also stated that one district court decision observed that "Congress has used the word 'travels' as opposed to 'traveled,'" and it noted that another district court decision "concluded that a violation of [SORNA] is not a continuing offense but, rather, is complete when the defendant travels in interstate commerce and then fails to register within the prescribed time period." Pet. C.A. Br. 17. But petitioner's brief did not say that any of the cited decisions had been resolved on statutory (as opposed to constitutional) grounds, and, more importantly, the brief never asserted that SORNA did not reach petitioner's own conduct. The court of appeals thus was correct in stating that "the only ground of [petitioner's] appeal [was] that his conviction violated the ex post facto clause." Pet. App. 12a.

iii. Petitioner suggests that his statutory claim is properly before this Court because it was "passed upon"

by the court of appeals. Pet. 6 n.1 (quoting *United States* v. *Williams*, 504 U.S. 36, 41-44 (1992)). That claim is likewise without merit. The Seventh Circuit did not decide the statutory issue "in the present case." *Williams*, 504 U.S. at 43. To the contrary, the court of appeals addressed that issue in the course of resolving an entirely different case (*United States* v. *Dixon*) to which petitioner was not a party in either the district court or the court of appeals.

It is true that the court of appeals addressed the statutory question in the same opinion in which it also resolved petitioner's appeal. But that is only because the court of appeals, acting on its own motion, consolidated petitioner's appeal with Dixon's for purposes of decision. There would be no question that petitioner could not seek this Court's review of a statutory claim if the court of appeals had issued an opinion in Dixon's case addressing both the statutory and constitutional issues that Dixon raised and then issued a second opinion in petitioner's case rejecting petitioner's constitutional claim based on the court's analysis in *Dixon*. The court of appeals' entirely fortuitous decision to resolve both cases in a single consolidated opinion does not warrant a different result.

Petitioner also overstates the scope of *Williams*'s holding. *Williams* holds that there are circumstances in which "[i]t is a permissible exercise of [this Court's] discretion to undertake review of an important issue expressly decided by a federal court" in situations where "the petitioner did not contest the issue in the case immediately at hand." 504 U.S. at 44-45. But *Williams* makes clear that its holding is limited to circumstances in which the party seeking this Court's review "contest[ed] the issue * * * as a party to the recent pro-

ceeding upon which the lower courts relied for their resolution of the issue." *Id.* at 45. Petitioner was not a party in *Dixon*, and he identifies no previous case in which he was a party where he argued that, as a statutory matter, SORNA does not apply to travel that occurred before its enactment.

b. Even if the statutory question were properly before this Court, petitioner's claim would fail on the merits. As the court of appeals explained in resolving Dixon's appeal (Pet. App. 4a), the statutory text does not expressly require that the defendant's interstate travel occur after the statute's effective date. Echoing the Tenth Circuit's reasoning in *United States* v. *Husted*, 545 F.3d 1240, 1242-1247 (2008), petitioner asserts (Pet. 16-18) that Congress's use of the present tense "travels" in 18 U.S.C. 2250(a)(2)(B) demonstrates that SORNA's criminal prohibition is inapplicable to sex offenders whose interstate travel occurred before its effective date. But as the court of appeals correctly explained, "the present tense is commonly used to refer to past, present, and future all at the same time." Pet. App. 6a (quoting *Coalition for Clean Air* v. *Southern Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992), cert. denied, 507 U.S. 950 (1993)).[5] As a result, "Congress' choice of tenses is not very revealing" with respect to SORNA. Pet. App. 5a (quoting *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977)). Cf. 1 U.S.C. 1 ("*unless the context indicates otherwise* * * * words used in the present tense include the future as well as the present") (emphasis added).

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[5] In contrast, the statute at issue in *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) (see Pet. 16), used "the past and present perfect tenses" in describing the relevant conduct.

Petitioner offers no response to the court of appeals' observation that his proposed construction of the statute would generate an "inconsistency" and produce results that "make[] no sense." Pet. App. 5a. The relevant clause refers to a defendant who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. 2250(a)(2)(B). The latter portion of this clause makes clear that SORNA's criminal prohibition applies to "old residents of Indian country, as well as new entrants." Pet. App. 5a. Accordingly, petitioner's proposed interpretation of the word "travels" in the former portion of that same clause would create a regime in which "a sex offender who has resided in Indian country since long before [SORNA] was passed [would be] subject to [SORNA] but not someone who crossed state lines before [SORNA] was passed." *Ibid.* In contrast, the court of appeals' interpretation reads Subsection (a)(2)(B) as a coherent whole, by viewing the entire Subsection as "establish[ing]" various "constitutional predicate[s] for" for federal legislative authority "rather than" imposing "a temporal requirement" with respect to interstate or foreign travel. *Id.* at 6a.

As the court of appeals observed, "[t]here is a close analogy" between SORNA and "the federal criminal law * * * that punishes felons who possess guns that have moved in interstate commerce." Pet. App. 4a. In *Scarborough*, this Court determined that "the purpose of [that statute] was to proscribe mere possession but * * * there was some concern about the constitutionality of such a statute." 431 U.S. at 575. In light of that purpose, *Scarborough* held that the felon-in-possession statute imposes "no more than a minimal nexus requirement" under which the government "need prove only that the firearm possessed by the convicted felon trav-

eled at some point in interstate commerce." *Id.* at 568, 577. As the court of appeals correctly reasoned, just as "[t]he danger posed by * * * a felon [who possesses a firearm] is unaffected by when the gun crossed state lines," the government and public interests served by monitoring the whereabouts of a convicted sex offender do not vary depending on whether he moved to a new jurisdiction before or after SORNA took effect. Pet. App. 4a.

Petitioner errs in asserting that "limiting the application of" SORNA's criminal provision "to post-enactment travel does not frustrate the overall intent of Congress" given the existence of various non-criminal provisions of SORNA itself, as well as "other existing enforcement mechanisms." Pet. 20-21. The purpose of SORNA, however, was to "establish[] a comprehensive national system for the registration of sex offenders," 42 U.S.C. 16901, and thus address "gaps and problems with existing Federal and State laws, as well as implementation of [existing] sex offender registration and notification programs." H.R. Rep. No. 218, *supra*, at 3, 23. Congress's decision to subject sex offenders who fail to comply with SORNA's registration requirements to "a felony criminal penalty" was an integral part of furthering that purpose. *Id.* at 26.

Petitioner also invokes the presumption against retroactivity, the constitutional avoidance canon, and the rule of lenity. Pet. 22-25. Petitioner's first two arguments merge because, as the court of appeals correctly explained, in criminal cases, the "policy against interpreting legislation to make it retroactive * * * is stated in the ex post facto clause." Pet. App. 6a. All of this Court's statements that petitioner cites about the

presumption against retroactivity were made in civil cases. See Pet. 22-23.

The constitutional avoidance canon is inapplicable here. That canon applies only when the most natural reading of a statute raises "serious constitutional doubts," *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005), and, in this case, it does not. See pp. 18-20, *infra*; Pet. App. 12a-13a. Petitioner's assertion (Pet. 24) that the court of appeals' interpretation of SORNA raises "serious constitutional doubts" because some district courts have held that such a construction would violate the Ex Post Facto Clause lacks merit. This Court has declined to apply the constitutional avoidance canon even in situations where multiple Justices were of the view that the statute, as construed by the Court, violated the Constitution. See, *e.g.*, *Harris* v. *United States*, 536 U.S. 545, 555-565 (2002).

Petitioner's rule of lenity argument also fails. The Court rejected a similar argument in *Scarborough*, explaining that the rule of lenity is triggered "only when [a court] is uncertain about the statute's meaning," even "[a]fter seizing every thing from which aid can be derived." 431 U.S. at 577 (brackets in original) (internal quotation marks and citation omitted). For the reasons explained above, there is no "grievous ambiguity" here that would warrant resort to the rule of lenity. *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998).

c. Petitioner asserts that this Court should grant a writ of certiorari because "there is a clear conflict in the circuits" about "whether SORNA applies to persons whose travel in interstate commerce took place prior to passage of the statute." Pet. 9. As the court of appeals acknowledged (Pet. App. 5a), its conclusion in *Dixon* that SORNA "does not require that the defendant's

travel postdate the Act," *id.* at 4a, conflicts with the Tenth Circuit's holding in *Husted* that "SORNA does not apply to [a defendant] whose interstate travel was complete prior to [SORNA's] effective date," 545 F.3d at 1247. But no other court of appeals has squarely resolved the issue.[6] Whether or not the conflict may merit this Court's review in an appropriate future case, it provides no warrant for granting a writ of certiorari in a case in which the defendant never raised the statutory claim on which he now seeks this Court's review and chose instead to limit his presentation to a constitutional claim that assumed a reading of the statute that was directly contrary to the one he now embraces.[7]

2. Petitioner also renews his contention that his prosecution for violating SORNA violated the Ex Post

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[6] Petitioner suggests that the Eleventh Circuit "arguably agrees" with the Seventh Circuit's interpretation of SORNA, Pet. 9, but he does not contend that the Eleventh Circuit's decision in *United States* v. *Dumont*, 555 F.3d 1288 (2009) (per curiam), petition for cert. pending, No. 08-10087 (filed Apr. 24, 2009), conflicts with the Tenth Circuit's decision in *Husted*. Petitioner acknowledges that the language from *United States* v. *May*, 535 F.3d 912 (8th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009), on which he relies was "dicta" (Pet. 11), and neither the Eighth Circuit's subsequent unpublished decision in *United States* v. *Hulen*, 309 Fed. Appx. 79, 79 (2009) (per curiam), nor *Hulen*'s description of the government's litigating position in that case transforms *May*'s dictum into a holding. Finally, although petitioner asserts that the Fourth Circuit's ultimate "conclusion" in *United States* v. *Hatcher*, 560 F.3d 222 (2009), "necessarily conflicts with the Seventh Circuit's opinion" in *Dixon*, petitioner acknowledges that *Hatcher* relied on a provision—42 U.S.C. 16913(d)—that the Seventh Circuit did not even consider in *Dixon*. Pet. 11 n.4.

[7] Petitioner also references "pervasive confusion in the district courts." Pet. 9. Such "confusion" in non-precedential decisions provides no justification for this Court to grant a writ of certiorari. Cf. Sup. Ct. R. 10(a).

Facto Clause. Pet. 28-32. That claim likewise does not merit further review.

a. Petitioner acknowledges that the court of appeals' rejection of his ex post facto claim does not conflict with the decisions of another court of appeals. See Pet. 25. That fact alone warrants the denial of the petition for a writ of certiorari.[8]

b. In any event, the court of appeals correctly rejected petitioner's ex post facto claim. "The critical question" for ex post facto purposes "is whether [a] law changes the legal consequences of acts completed before its effective date." *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981). As the court of appeals correctly explained, the relevant criminal conduct in this case "*was not complete* when [SORNA] became applicable to [petitioner]." Pet. App. 13a (emphasis added).

Regardless whether pre-SORNA law also required petitioner to register as a sex offender upon his pre-SORNA move to Indiana, see Pet. 28, SORNA imposed a new and additional duty to do so. Cf. Pet. 4 (acknowledging that SORNA "created a new, national sex offender registry"). The court of appeals determined that the duty to register created by SORNA did not apply to petitioner before February 28, 2007, which was seven months after SORNA was enacted. Pet. App. 3a-4a, 9a-10a; see note 2, *supra*. The court of appeals further determined that SORNA only required petitioner to register "within a reasonable time after" February 28, 2007. *Id.* at 11a. Because the Ex Post Facto Clause is not implicated "as long as at least one of the acts [required for

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[8] Petitioner asserts that "[t]he district courts are deeply divided on" the ex post facto question. Pet. 25. As with respect to petitioner's statutory issue, see note 7, *supra*, a division in non-precedential decisions does not merit this Court's review.

punishment] took place" after the enactment of the relevant statute, the court of appeals correctly held that petitioner's "rights under the ex post facto clause were not violated" here. *Id.* at 8a-9a, 13a.[9]

Petitioner also contends (Pet. 29-32) that the court of appeals erred in viewing a failure to register under SORNA "as a 'continuing offense.'" Pet. 29 (quoting Pet. App. 2a). That is a statutory argument, not a constitutional one, and, as explained previously, no questions of statutory interpretation are properly before this Court. See pp. 9-13, *supra*. At any rate, the court of appeals did not rest its ex post facto analysis on a finding that petitioner's violation of SORNA began before, but then continued until after, the date on which the statute took effect with respect to him. Cf. *Toussie* v. *United States*, 397 U.S. 112, 113-114 (1970) (addressing whether a defendant whose violation of the relevant statute was complete in 1959 could still be prosecuted in 1967 notwithstanding a five-year statute of limitations on the theory that every day he failed to register for the draft constituted an additional violation of the statute).

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[9] Accord *United States* v. *Russell*, 186 F.3d 883, 885 (8th Cir. 1999) (holding that the Deadbeat Parents Punishment Act of 1998, 18 U.S.C. 228, did not violate the Ex Post Facto Clause because the statute did not punish past accrual of support payments, but post-enactment failure to pay); *United States* v. *Alkins*, 925 F.2d 541, 549 (2d Cir. 1991) ("Since appellants permitted the final element of the crime to occur after the effective date of the statute, their mail fraud convictions did not violate the *ex post facto* clause."); *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978) (holding that application of 18 U.S.C. 1962(c) would not violate the Ex Post Facto Clause so long as at least one act in the "pattern of racketeering activities" occurred after the enactment of the statute); *United States* v. *Campanale*, 518 F.2d 352, 364-365 & n.34 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976) (same).

Instead, the court of appeals determined that petitioner's violation of SORNA was not yet "complete" when the statute first became applicable to him and only was completed when petitioner failed to register within a reasonable time after the Attorney General's interim rule took effect. Pet. App. 13a.[10]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LANNY A. BREUER
Assistant Attorney General

KATHLEEN A. FELTON
Attorney

AUGUST 2009

[10] Petitioner observes that "several district courts have also found that SORNA exceeds Congress' power under the Commerce Clause." Pet. 26 n.11. Petitioner raised no Commerce Clause challenge before either the district court or the court of appeals, and he does not ask the Court to grant a writ of certiorari to consider one. This Court previously has denied at least one petition for a writ of certiorari that asserted that SORNA exceeded Congress's authority under the Commerce Clause. See *May*, *supra* (No. 08-7997).

REPLY BRIEF

Supreme Court, U.S.
FILED
AUG 19 2009
OFFICE OF THE CLERK

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the Untied State Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

The government evidently recognizes that the issues presented in this case warrant review. On the statutory question, it acknowledges a conflict in the courts of appeals. It has nothing to say about the dozens of district court decisions across the Nation that reflect pervasive confusion on the statutory and constitutional questions—at least 20 of which have held that SORNA either does not apply to, or cannot constitutionally be applied to, persons who traveled in interstate commerce only before the statute's effective date. It does not deny that it continues to prosecute such cases aggressively. And it makes no response to our demonstration that the issues presented here are recurring ones of enormous practical importance.

In nevertheless opposing review on the statutory question presented, the government rests almost exclusively on a single proposition: that the issue was not adequately presented below. But this argument is insubstantial. The court of appeals expressly decided the question, in the course of resolving petitioner's case. In these circumstances, the government offers no reason for the Court to delay consideration of an issue that urgently needs definitive resolution.

A. The Court Has The Authority To Decide Both Issues Presented In This Case, And Prudential Considerations Strongly Support Review

At the outset, the government very notably does not deny the Court's *authority* to decide the statutory issue presented. Nor could it: The Court may properly consider a question so long as it was "pressed *or* passed on by the courts below." *United States* v. *Wil-*

liams, 504 U.S. 36, 43 (1992) (quoting *Springfield* v. *Kibbe*, 480 U.S. 257, 266 (1987) (O'Connor, J., dissenting)). That being so, there is no prudential reason for the Court to delay consideration of the statutory issue presented—and compelling reasons for the Court to address the issue now.

First, whether or not petitioner pressed the statutory question below,[1] it is settled that any issue passed upon in the court of appeals is subject to this Court's "broad discretion over the questions it chooses to take on certiorari." *Verizon Commc'ns* v. *FCC*, 535 U.S. 467, 530 (2002) (holding that issue raised *sua sponte* by court of appeals was properly before this Court); see also, *e.g.*, *United States* v. *United Foods*, 533 U.S. 405, 416 (2001) (explaining this Court may consider any issue "addressed by the court whose judgment [is] being reviewed"); *Va. Bankshares* v. *Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue presented[.]"). In nevertheless opposing review, the government observes that the statutory issue was directly pressed by a defendant in a consolidated case rather than by petitioner. But the government does not offer any reason *why* this consideration should make any difference and

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[1] In fact, petitioner's brief to the Seventh Circuit emphasized that other courts had refused to apply SORNA retroactively because "Congress has used the word 'travels' as opposed to 'traveled,'" Pet. C.A. Br. at 17—the core of the statutory interpretation issue. Moreover, in addressing petitioner's Ex Post Facto argument, any court inclined to invalidate the statute on constitutional grounds would have been required to consider whether SORNA admits of a saving construction under the rule of constitutional avoidance.

points to no authority in which this Court has suggested that it will decline to grant review in such circumstances.[2]

Second, there is no reason for the Court to delay review. Ordinarily, of course, the Court avoids consideration of issues not presented or addressed below to ensure "the adequate development of the record" and "protect[] the Court from deciding questions that could have been resolved by the lower courts." *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *United States Philips Corp.*, 510 U.S. 27, 38 n.8 (1993) (Stevens, J., dissenting). But here, the issue *was* presented to, fully considered, and expressly resolved by the Seventh Circuit at the time that it decided petitioner's case. It is manifest that nothing would have been added, and the outcome would have been exactly the same, had it been petitioner rather than the consolidated defendant that fully briefed and argued the issue. Indeed, during oral argument before the Seventh Circuit petitioner's counsel explicitly told the court that, in material part, the facts of petitioner's case were identical to those of the consolidated defendant's, whose case was argued immediately before to the same panel.[3] The government thus is unable to point to any factual or legal aspect of petitioner's

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[2] Pointing to *Williams*, 504 U.S. at 43, the Government suggests that the Seventh Circuit did not decide the statutory issue "in the present case." But there is no doubt that the issue was "addressed by the court whose judgment [is] being reviewed." *United Foods*, 533 U.S. at 416.

[3] No transcript of the argument before the court of appeals was made. An audio recording of the argument is available at http://www.ca7.uscourts.gov (last visited Aug. 18, 2009). The relevant discussion may be found in the first minute of the recording and at 5 minutes 45 seconds into the recording.

case that would have made any difference to the Seventh Circuit's decision had the case been presented differently, and there is no doubt that, had the Seventh Circuit ruled in favor of the consolidated defendant on the statutory issue, it would have reversed petitioner's conviction as well.

Third, prudential considerations point strongly and decisively *in favor* of immediate review. As the dozens of conflicting lower court decisions graphically illustrate, there is pervasive confusion in the courts on this issue. Pet. 12 n. 6 & 14 n.7. Because the government continues aggressive prosecutions under SORNA of persons who traveled before the statute's enactment, continued litigation of the issue across the country will guarantee an enormous waste of judicial and litigants' resources. It also would ensure that many persons will be prosecuted and convicted for conduct that (if we are correct in our reading of SORNA) is not criminal at all. And that is especially so because, even as the government urges the Court to wait for a different case to address the questions presented, it is doing all it can to prevent definitive resolution of those questions by strategically declining to appeal or withdrawing its appeal whenever it loses in district court– a strategy it does not deny but makes no attempt to explain.[4] Further review therefore is in order.

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[4] The Government notes that the pending petition in *Akers* v. *United States*, No. 08-10318 (May 4, 2009), presents the same questions regarding SORNA's retroactive application. U.S. Br. 9 n.4. As it does here, it opposes the statutory question presented in that petition on procedural grounds.

B. The Conflict And Confusion In The Lower Courts On Both Issues Presented Warrants Review

On the substance of the petition, the government makes no serious argument that the statutory question does not warrant review. It acknowledges the conflict between the Seventh and Tenth Circuits. U.S. Br. 16-17. Although it discounts the Eighth Circuit's agreement with the Tenth as dicta (U.S. Br. 17 n.6), it does not deny that *it* has informed the Eighth Circuit that "[t]he government concedes that pre-SORNA interstate travel cannot violate SORNA" and that the Eighth Circuit accepted that concession as binding. *United States* v. *Hulen*, Nos. 08-2265 & 08-2379, 2009 WL 174951, at *1 (8th Cir. Jan. 27, 2009). And while the government doubtless is correct that isolated disagreements between district courts ordinarily do not warrant review by this Court, the extent of the conflict in the lower courts on the statutory issue presented here is extraordinary in its volume and scope: There have been no fewer than thirty district court decisions on these issues, with at least seventeen holding against the government. The government's blithe dismissal of such litigation as immaterial would be incorrect in any circumstance, and is especially so when the government itself has made extraordinary efforts to forestall resolution of the issue at the appellate level by declining to challenge adverse decisions on appeal.

The same is true of the constitutional issue presented in the petition. Here again, there have been almost two dozen lower court decisions, with at least seven holding SORNA unconstitutional as applied to pre-enactment travel. And here, too, the government has suppressed development of the law at the appel-

late level by declining to appeal or withdrawing appeal whenever it has lost. As a consequence, dozens of prosecutions have been pressed, and many more will be, in circumstances that (if we are correct on the merits) violate the Constitution.[5]

Moreover, the government does not deny that the issues presented here are ones of enormous practical importance. As we explained in the petition, the legal rules at stake likely affect the obligations of many thousands of persons. Notwithstanding its understandable reluctance to test its theories before appellate courts, the government continues to prosecute these cases with significant frequency. The result, as we showed in the petition, has been confusion, the waste of resources, and unacceptably inconsistent outcomes for identically situated persons. The government makes no response to these points. The questions presented call for review.

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[5] Since the petition was filed in this case, litigation on the constitutional issue has proceeded apace. Several district courts have upheld the constitutionality of SORNA where the defendant's *post-enactment* interstate travel was recited as a dispositive fact precluding an Ex Post Facto challenge. *United States* v. *Johnson*, No. 3:09-cr-8, 2009 WL 2144132, at *4 (S.D. Miss. July 15, 2009); *United States* v. *Harris*, No. 1:08-cr-211, 2009 WL 1549288, at *5 (M.D. Ala. May 29, 2009); *United States* v. *Talada*, No. 5:08-cr-00269, 2009 WL 1587178, at *7 (S.D. W. Va. June 5, 2009). Similarly, the court in *United States* v. *Burkey* rejected a constitutional challenge in substantial part because it understood that § 2250(a) "*only* punishes convicted sex offenders who travel in interstate commerce after the enactment of SORNA and who fail to register or update registration." No. 2:08-cr-00145, 2009 WL 1616564, at *22 (D. Nev. June 8, 2009) (emphasis added). One additional court of appeals also has rejected an Ex Post Facto issue. *United States* v. *Gould*, 568 F.3d 459 (4th Cir. 2009).

C. The Government's Defense Of The Merits Of The Seventh Circuit's Holding Is Incorrect

Rather than offer any reason to believe that the case does not warrant the Court's consideration, the government devotes much of its opposition to a defense of the merits of the Seventh Circuit's decision. On this point, for present purposes it should be enough to observe that the government's position is, to say the least, highly debatable: Its reading of the statute has been rejected by several courts of appeals and well more than a dozen district courts, while more than half a dozen other district courts have held SORNA prosecutions unconstitutional as applied to pre-Act travel. In such circumstances, this Court should decide who is right.

There are plain weaknesses in the government's position on the merits. Concerning the meaning of SORNA, perhaps the most notable of these is the government's disregard for the statutory language. Like the Seventh Circuit, the government maintains that courts should overlook Congress's choice of verb tense in SORNA. U.S. Br. 13. But this Court has often explained that Congress's choice of verb tense determines the meaning of statutory language. See, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."); *Bragdon* v. *Abbott*, 524 U.S. 624, 661 (1998) ("[T]he ADA's definition of a disability is met only if the alleged impairment substantially 'limits' (present tense) a major life activity.").

In arguing to the contrary, the government, somewhat bafflingly, cites 1 U.S.C. § 1, which pro-

vides: "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * words used in the present tense include the *future* as well as the present" (emphasis added). But a presumption that the present tense includes the *future* tense does not support the idea that the present tense also includes the *past* tense. Indeed, both the Ex Post Facto Clause and the presumption against retroactivity strongly suggest just the opposite in the context of criminal-law statutes.[6]

As for the Ex Post Facto issue, the Government is correct that the Seventh Circuit concluded that petitioner's conduct was not yet complete when the statute became applicable to him. Pet. App. 13a. But both the government and the court fail to explain how that is so unless failure to register is a continuing offense. In the companion *Dixon* case, the court of appeals concluded that the other defendant's conviction violated the Ex Post Facto Clause because there was no evidence specially showing that the other defendant failed to register other than on February 28, 2007, when the law became applicable to him. Pet. App. 10a. The court of appeals distinguished petitioner's case because petitioner admitted having not registered by July 2007. Pet. App. 12a. But both petitioner and the other defendant "completed" the act of

---

[6] The government insists that our reading of the statute leads to inconsistent treatment of persons living in "Indian country" and those who have traveled in interstate commerce. U.S. Br. 14. But even if that were so, in the context of a statute allocating a number of law-enforcement responsibilities between state and federal authorities, Congress could well have envisioned different treatment for persons living under federal jurisdiction on the one hand, and those who simply have traveled in interstate commerce on the other.

failing to register on the day that the law became applicable to them. Unless petitioner's offense "continued" until July 2007, the two cases are indistinguishable. Because petitioner's failure to register (whether under SORNA or the predecessor Wetterling Act) is not a continuing offense under this Court's precedents (see Pet. 29-32), petitioner's conviction under SORNA violated the Ex Post Facto Clause. See, *e.g.*, *United States* v. *Mantia*, 2007 WL 4730120, at *5 (W.D. La. Dec. 10, 2007) ("Section 2250 cannot be constitutionally applied here because neither the travel nor the failure to register were crimes covered by § 2250 when [the defendant] traveled to Louisiana and failed to register" and rejecting the "government['s] * * * argu[ment] that § 2250 proscribes a 'continuing offense'").[7]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[7] The government's contention that this "is a statutory argument, not a constitutional one," and therefore not properly before the Court (U.S. Br. 19), is silly; under its theory, SORNA is saved from unconstitutionality by the nature of the statute.

Respectfully submitted.

THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602
Counsel for Petitioner

AUGUST 2009

PETITIONER'S BRIEF

Supreme Court, U.S.
FILED
DEC 3 - 2009
OFFICE OF THE CLERK

147

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE PETITIONER

DAN M. KAHAN
THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602

Counsel for the Petitioner

TC-FTA
591EMA

QUESTIONS PRESENTED

Since 2006, the Sex Offender Registration and Notification Act ("SORNA") has required newly convicted sex offenders to register with a national sex offender database. See 42 U.S.C. § 16913(a). On February 28, 2007, through a regulation promulgated pursuant to specific authorization in SORNA, the Attorney General made the same registration requirement applicable to persons convicted of sex offenses prior to SORNA's enactment. See 42 U.S.C. § 16913(d); 28 C.F.R. § 72.3.

SORNA makes failure to abide by the registration requirement a federal crime. See 18 U.S.C. § 2250. A ten-year maximum penalty may be imposed on any person convicted of a sex offense under state law who (1) "is required to register under the * * * Act"; (2) "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"; and (3) "knowingly fails to register or update a registration as required by the * * * Act." 18 U.S.C. § 2250(a)(1), (2)(B), (3).

The questions presented are:

1. Whether a conviction under 18 U.S.C. § 2250(a)(2)(B) may be predicated on interstate travel by the defendant before he or she became subject to the SORNA registration requirement.

2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a)(2)(B) of a person who was both convicted of a sex offense and traveled in interstate commerce before the enactment of SORNA.

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OPINIONS BELOW

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JURISDICTION

The court of appeals entered judgment on December 22, 2008. On March 12, 2009, Justice Stevens extended the time for filing a petition for a writ of certiorari until April 22, 2009, and petitioner filed the petition on that date. The Court granted the petition on September 30, 2009. The Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The relevant provisions of the Ex Post Facto Clause, U.S. Const. Art. I, § 9; the Sex Offender Registration and Notification Act (codified at 18 U.S.C. § 2250 and 42 U.S.C. § 16913); and associated regulations (codified at 28 C.F.R. § 72.3) are reproduced in an appendix to this brief.

STATEMENT

The Sex Offender Registration and Notification Act ("SORNA") requires persons who are convicted of certain sex offenses to register in specified jurisdictions. A person who has been convicted of a sex offense under state law commits a federal crime if he or she "is required to register under" SORNA, "travels in interstate or foreign commerce," and knowingly "fails to register * * * as required by" SORNA. In this case, the court of appeals held that the travel element of this offense is satisfied by travel occurring *prior* to SORNA's enactment. That holding was wrong: It departed both from the plain statutory

text, which is written in the present tense, and from the broader structure of SORNA's criminal provision.

Disregard of the statutory language, however, is only the beginning of the mischief worked by the holding below. That decision also creates a set of serious constitutional and interpretive difficulties. As the court of appeals itself recognized, applying SORNA retroactively to persons who both committed their underlying offenses and traveled in interstate commerce prior to SORNA's enactment would appear to violate the Ex Post Facto Clause because that would mean that such persons had no opportunity to avoid criminal liability. The court tried to solve this problem by reading into the statute a "reasonable" grace period for such persons to register before they are subject to prosecution. But that effort, in turn, launched the court on a voyage of impermissible judicial lawmaking, resulting in a vague, confusing, and indeterminate statutory requirement. The court of appeals should simply have applied the statute as written—and held that the "travels" element of SORNA's criminal offense is satisfied only by travel that post-dates enactment of the statute and attachment of the SORNA registration requirement.

A. Statutory And Regulatory Background

1. In 1994, Congress passed SORNA's predecessor, the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, establishing guidelines for States to use in tracking sex offenders and giving them three years to implement systems to do so, at the risk of losing federal crime-control funding. Pub. L. No. 103-322 tit. XVII, subtit. A, 108 Stat. 2038-2042 (1994) (codified as amended at 42 U.S.C. § 14071). The Wetterling Act required persons convicted of sexually violent offenses or cer-

tain criminal offenses against minors to register a current address with a designated state law-enforcement agency after release from prison. *Id.* at 2038, 2040-2041. Most offenders satisfied their registration requirement by returning a verification-of-address form to the agency once each year for ten years. *Id.* at 2040-2041. An offender moving his or her residence between States was allowed ten days to register with the new State. *Id.* at 2041. The Wetterling Act did not initially include a federal criminal penalty for failing to register or for failing to keep registration current. See *id.* at 2041 (requiring individual States to criminalize failure to register). By 1996, every State and the District of Columbia had enacted a sex offender registration law. *Smith* v. *Doe*, 538 U.S. 84, 90 (2003).

That year, Congress amended the Wetterling Act and directed the Attorney General to establish a national registry of sex offenders at the FBI. Pam Lychner Sexual Offender Tracking and Identification Act of 1996, Pub. L. No. 104-236, 110 Stat. 3093 (codified as amended at 42 U.S.C. § 14072). The amendment required anyone subject to registration under the Wetterling Act who resided in a State without a "minimally sufficient registration program" to send a current address, photograph, and fingerprints to the FBI for inclusion in the FBI database. 110 Stat. at 3094. The amendment made knowing failure to register a federal crime; the maximum penalty for an offender's first conviction for failure to abide by this registration requirement is a one-year term of imprisonment. *Id.* at 3096.

In 1997, Congress amended the Wetterling Act yet again, requiring all States to participate in the national registry. General Provisions of Title I of the

Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1998, Pub. L. No. 105-119, § 115, 111 Stat. 2440, 2461-2467 (1997) (codified at 42 U.S.C. §§ 14071-14072). States were required to provide the FBI with the current address, fingerprints, and conviction information for Wetterling-defined sex offenders to be included in the national registry. *Ibid.*

2. In 2006, Congress decided that "the patchwork of standards that had resulted from piecemeal amendments [to the Wetterling Act] should be replaced with a comprehensive new set of standards." National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,045 (July 2, 2008). The result was the enactment of SORNA. Pub. L. No. 109-248 tit. I, 120 Stat. 590-611 (2006) (codified at 18 U.S.C. § 2250 and scattered sections of 42 U.S.C.).

The President signed SORNA into law on July 27, 2006. See 120 Stat. at 587. The statute created a new, national sex offender registry intended to supplement the one created by the 1996 and 1998 amendments to the Wetterling Act. SORNA requires sex offenders to register and maintain their registration status in each jurisdiction where they live, work, or attend school. 42 U.S.C. § 16913(a).

The statute expanded the Wetterling Act's definition of "sex offense" to cover any "criminal offense that has an element involving a sexual act or sexual contact with another," as well as any attempt or conspiracy to commit such offenses, with qualified exceptions for foreign convictions and consensual activity. 42 U.S.C. § 16911(5). It also expanded the amount of information that States must record about each offender in their registries. See *id.* § 16914(a).

In addition to an offender's current address, photograph, and fingerprints, which were sufficient for States to record for non-"predator" offenders under the Wetterling Act, *id.* § 14072(c), registration under SORNA requires all sex offenders to provide their Social Security number, employer information, school information, and vehicle information, *id.* § 16914(a), as well as Internet aliases, e-mail and instant messaging addresses, telephone and cellular phone numbers, parking information, passport information, and date of birth. National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,054-38,058 (July 2, 2008).[1] At the time of registration, SORNA also requires a jurisdiction to record a sex offender's physical description, sexual offense, criminal history, full palm print, DNA sample, and a photocopy of the offender's driver's license. 42 U.S.C. § 16914(b).

Sex offenders are instructed by SORNA to register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than three business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1)-(2). When a sex offender changes, name, residence, employer, or student status, he or she must appear in person to update the registration within three days of the change. *Id.*

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[1] See also the Keeping the Internet Devoid of Sexual Predators [KIDS] Act, directing the Attorney General to "require that each sex offender provide to the sex offender registry those Internet identifiers the sex offender uses or will use of any type that the Attorney General determines to be appropriate under that Act." Pub. L. No. 110-400, 122 Stat. 4224 (2008) (codified at 42 U.S.C. §§ 16915a-16915b).

§ 16913(c). The Wetterling Act, by contrast, did not generally require in-person registration.

Of particular relevance here, SORNA also created the new federal felony of failing to register, which—in contrast to the maximum term of one year's imprisonment for violation of the Wetterling Act—is punishable by up to ten years in prison, even for a first offense. 18 U.S.C. § 2250(a). So far as persons who are defined as sex offenders because of a conviction under state law are concerned, SORNA allows for the imposition of this federal criminal penalty on someone who (1) "is required to register under [SORNA]"; (2) "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country"; and (3) "knowingly fails to register or update a registration as required by [SORNA]." *Ibid.*[2] SORNA also requires States to create a criminal offense with a maximum prison term of *more* than one year for sex offenders who fail to register, 42 U.S.C. § 16913(e), on pain of losing federal funding. *Id.* § 16925(d).

3. SORNA expressly grants the Attorney General "the authority to specify the applicability of the requirements of this subchapter [*i.e.*, the registration requirement] to sex offenders convicted *before* July 27, 2006 or its implementation in a particular jurisdiction." 42 U.S.C. § 16913(d) (emphasis added). In the same subsection, SORNA permits the Attorney General to set rules for the registration of such pre-

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[2] Movement in commerce need not be shown when a person is prosecuted for failing to register as a sex offender because of a conviction under federal law, the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States. 18 U.S.C. § 2250(a)(2)(A).

SORNA sex offenders. *Ibid.* Although the Attorney General took the position that the registration requirement has applied to such persons from the very date of the statute's enactment,[3] on February 28, 2007, he exercised his authority to issue a regulation expressly expanding the statute's reach to pre-SORNA sex offenders. Applicability of the Sex Offender Registration and Notification Act, 72 Fed. Reg. 8894, 8897 (Feb. 28, 2007) (codified at 28 C.F.R. § 72.3.)[4] The regulation provides that "[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." *Ibid.* At the same time, however, the Attorney General declined to issue guidance clarifying the rules for the registration of those sex offenders, such as the procedure for registration. Although the statute itself sets the time frame for registration by

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[3] Four courts of appeals, including the Seventh Circuit in the instant case, have interpreted this grant of authority to mean that SORNA did *not* apply to sex offenders convicted before its enactment until the Attorney General so specified. See *United States* v. *Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009); *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009); *United States* v. *Dixon*, Pet. App. 9a-10a; *United States* v. *Madera*, 528 F.3d 852, 856-859 (11th Cir. 2008). But see *United States* v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (agreeing with Attorney General's interpretation); *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same).

[4] The Attorney General published the regulation without undertaking the notice and comment process or the thirty-day waiting period generally required under the Administrative Procedure Act. See *United States* v. *Cain*, 583 F.3d 408, 413 (6th Cir. 2009). For those reasons, the Sixth Circuit held that the regulation could not be applied to a defendant indicted less than thirty days after the regulation was promulgated and a month before the close of the comment period. *Id.* at 420.

persons convicted of sex offenses *after* SORNA went into effect, it establishes no such grace period for persons convicted prior to SORNA's enactment, and the Attorney General's regulation also does not address the subject. *Ibid.*[5]

4. A State's implementation of SORNA must include "maintain[ing] a jurisdiction-wide sex offender registry conforming to the requirements of [SORNA]," 42 U.S.C. § 16912(a); "provid[ing] a criminal penalty" for a sex offender's failure to register, *id.* § 16913(e) ; "mak[ing] available on the Internet * * * all information about each sex offender in the registry," *id.* § 16918(a); and "provid[ing] the information in the registry" about each offender to various national and local law enforcement agencies and community organizations, including the Attorney General, *id.* § 16921(b). A jurisdiction's failure substantially and timely to comply with SORNA will result in a substantial reduction in its federal crime-control funding. 42 U.S.C. § 16925(a).

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[5] The regulation stated: "The purpose of this interim rule is not to address the full range of matters that are within the Attorney General's authority under section 113(d), much less to carry out the direction to the Attorney General in section 112(b) to issue guidelines and regulations to interpret and implement SORNA as a whole." 72 Fed. Reg. at 8896. The Attorney General did not issue guidelines for the registration of sex offenders convicted before SORNA's enactment until July 2, 2008, when he allowed jurisdictions between three and twelve months to enter pre-SORNA-convicted offenders into the registration system once those jurisdictions have implemented SORNA. 73 Fed. Reg. at 38,063-38,064. Even so, these regulations still do not establish registration procedures or timelines for compliance by *individual* offenders.

Congress gave States a three-year grace period to implement SORNA, tying the repeal of the Wetterling Act to the deadline for States to implement SORNA, with up to two one-year extensions available at the discretion of the Attorney General. See SORNA §§ 129, 124, 120 Stat. at 600, 598 (codified in part at 42 U.S.C. § 16924). On May 26, 2009, with no jurisdictions likely to meet the three-year deadline, the Attorney General issued a blanket one-year extension until July 26, 2010, for States to implement SORNA, delaying the repeal of the Wetterling Act to no sooner than that date. Att'y Gen. Order No. 3081-2009, available at http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf.

As this delay suggests, States have not readily complied with SORNA, complaining of expense, technical difficulty, complexity, and bureaucratic obstacles. See SEARCH, *SEARCH Survey on State Compliance with the Sex Offender Registration and Notification Act (SORNA)* (April 2009), at http://bit.ly/6Aor3t. The Department of Justice has certified only two jurisdictions as having substantially implemented SORNA's requirements, Ohio and the Confederated Tribes of the Umatilla Indian Reservation. U.S. Dep't of Justice, Press Release, *Justice Department Announces First Two Jurisdictions To Implement [SORNA]* (Sept. 23, 2009), available at http://www.ojp.usdoj.gov/smart/pdfs/smart09154.pdf. California volunteered to suffer the federal financing penalty rather than implement SORNA, which would cost the State an estimated $59 million to implement completely. See Tracy Breton, *Implementing Sex Offender Registration Law May Prove Impossible*, Providence J. (Mar. 15, 2009), available at http://bit.ly/61O2wQ.

When this case was decided by the Seventh Circuit on December 22, 2008, the court found that Indiana, the State where petitioner was required to register, "ha[d] yet to establish any procedures or protocols for the collection, maintenance, and dissemination of the detailed information required by the Act * * *." Pet. App. 3a. Indiana remains out of compliance to this day: its current sex offender registration law, Indiana Code Ann. §§ 11-8-8-1 to 11-8-8-22 (LexisNexis Supp. 2009), fails to require collection of telephone and cellular phone numbers, parking information, passport information, a DNA sample, and a palm print, all of which are required by SORNA. See Ind. Code Ann. § 11-8-8-8. Indiana has, however, created a criminal penalty for failure to register, effective July 1, 2006, making such failure a Class D felony in most cases (Pub. L. 140-2006, § 13, 2006 Ind. Acts 2327-28 (codified as amended at Ind. Code 11-8-8-17)), carrying a prison sentence of up to three years. Ind. Code § 35-50-2-7(a).

5. Despite most jurisdictions' lack of implementation, the Attorney General has stated that "SORNA's direct federal law registration requirements for sex offenders are not subject to any deferral of effectiveness. They took effect when SORNA was enacted on July 27, 2006 * * * ." 72 Fed. Reg. 8894, 8895 (Feb. 28, 2007). Similarly, the final regulations in the National Guidelines for SORNA issued by the Attorney General declare expressly that SORNA requires registration by sex offenders regardless of whether the relevant jurisdiction has implemented the statute. 73 Fed. Reg. 38,030, 38,063 (July 2, 2008) ("SORNA applies to all sex offenders, including those convicted of their registration offenses prior to the enactment of SORNA *or prior to particular jurisdictions' incorporation of the SORNA requirements into their pro-*

grams." (emphasis added)). Under SORNA, then, sex offenders must register "as required by [SORNA]," 18 U.S.C § 2250(a)(3), whether or not their jurisdictions have fully implemented SORNA, as indeed almost none have.

Because every State and the District of Columbia had enacted a sex offender registration law prior to SORNA, however, the government's consistent position in litigating SORNA prosecutions has been that registration under one of these pre-SORNA state procedures suffices as registration "under [SORNA]" for purposes of avoiding § 2250 criminal liability. See pages 38-40, *infra*. The five circuits that have ruled on the question, including the court of appeals here, have accepted this position. *United States* v. *Brown*, No. 08-17244, 2009 WL 3643477, at *5 (11th Cir. Nov. 5, 2009); *United States* v. *George*, 579 F.3d 962, 966 (9th Cir. 2009); *United States* v. *Gould*, 568 F.3d 459, 464 (4th Cir. 2009); *United States* v. *Dixon*, Pet. App. 3a-4a; *United States* v. *Hinckley*, 550 F.3d 926, 939 (10th Cir. 2008). Every district court to confront the issue has held the same. See *United States* v. *Leach*, No. 3:09-CR-00070(01)RM, 2009 WL 3762331, at *3 (N.D. Ind. Nov. 6, 2009).

The government's position has had the consequence that, until a jurisdiction fully implements SORNA, the new statute requires satisfaction of the *Wetterling Act's* (and existing state) registration requirements and nothing more. Thus, offenders who were in compliance with the Wetterling Act and with state registration law when SORNA came into effect have not been prosecuted as being in violation of SORNA, even though those registrations do not in fact comport with the form of registration or scope of information required by SORNA. That has necessar-

ily been the case, as compliance with the technical requirements of SORNA registration, in virtually all jurisdictions, has been a literal impossibility.

B. Factual and Procedural Background

1. On February 6, 2003, petitioner was arrested and charged with first-degree sexual abuse in Alabama state court for inappropriately touching a 14-year-old female over her clothes. Presentence Report ¶¶ 70-71. He pled guilty and on May 17, 2004, received a fifteen-year sentence, with all but two years suspended and the remainder to be served on probation.. *Id.* ¶ 70. He received credit for time served, earned release from prison on July 3, 2004, and registered with Alabama as a sex offender three days later, complying with the then-existing registration requirement. Pet. App. 15a. Congress had not enacted SORNA when petitioner was released.

Also before SORNA's enactment, sometime in 2004 or 2005, petitioner moved from Alabama to Fort Wayne, Indiana. Pet. App. 15a. On July 19, 2007, he was arrested for his involvement in a fight, unrelated to any sex offense. Presentence Report ¶¶ 71-72. After petitioner's arrest, authorities determined that he had previously committed a sex offense and that he had not yet complied in Indiana with SORNA's since-enacted registration requirements.

On August 22, 2007, a federal grand jury in the Northern District of Indiana indicted petitioner for failing to register as a sex offender under 18 U.S.C. § 2250, SORNA's criminal provision.[6] Presentence

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[6] Although the indictment identified travel on or about July 2007, Pet. App. 14a, there is in fact no dispute that petitioner's relevant travel in interstate commerce occurred in 2004 or

Report ¶ 1. He moved to dismiss the indictment on the ground that his interstate travel predated both SORNA's enactment in 2006 and its application to him in 2007. Pet. App. 15a. The district court denied the motion. *Id.* at 19a. Petitioner then entered a conditional guilty plea preserving the right to appeal the denial of his motion to dismiss (Presentence Report ¶¶ 5, 14), and was sentenced to serve thirty months in prison.

2. The court of appeals consolidated petitioner's case with the appeal of a similarly situated defendant and affirmed petitioner's conviction. Pet. App. 1a-13a. Rejecting the Tenth Circuit's contrary conclusion in *United States* v. *Husted*, 545 F.3d 1240 (10th Cir. 2008), the Seventh Circuit held that § 2250(a)(2)(B) does not require that a defendant's interstate travel postdate the Act. Pet. App. 4a-6a. The court found Congress's use of the present-tense verb "travels" in § 2250(a)(2)(B) to be immaterial, opining that "'Congress's choice of tenses is not very revealing'" (*id.* at 6a, quoting *Scarborough* v. *United States*, 431 U.S. 563, 571 (1977)) and that "'the present tense is commonly used to refer to past, present, and future all at the same time.'" *Id.* at 6a (citation omitted). The court also observed that SORNA's criminal provision applies to someone who "resides in" Indian country and that "on the Tenth Circuit's logic, a sex offender who has resided in Indian country since long before the Act was passed is subject to

2005, before the date of SORNA's enactment. See Gov't C.A. Br. at 2 ("The facts pertinent to this issue in this case are not in dispute. * * * In either 2004 or 2005, the Defendant moved to Indiana. On July 19, 2007, the Fort Wayne police became aware that the Defendant was living in Fort Wayne. As of that date, he was not registered as a sex offender in the state of Indiana.").

the Act but not someone who crossed state lines before the Act was passed. That result makes no sense[.]" *Id.* at 5a. Instead of looking to SORNA's language, the court of appeals turned to the statute's policy, finding that "[t]he evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected"; the court found that this "concern is as acute in a case in which the offender moved before the Act was passed as in one in which he moved afterward." *Id.* at 4a.

The court of appeals did hold that § 2250(a)(2)(B) violates the Ex Post Facto Clause when applied to defendants who committed a SORNA-triggering sex offense and traveled interstate before SORNA was passed, *and* who were not given a "reasonable time" to register under SORNA. *Id.* at 10a-13a. The court observed that neither SORNA nor the Attorney General's retroactivity regulation gave previously convicted sex offenders a grace period within which to register when SORNA became applicable to them (*id.* at 10a), but it ruled that "[w]hatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero." *Id.* at 12a. The court therefore reversed the conviction of the other appellant in the consolidated appeal because it was not evident to the court when that appellant's "failure to register" occurred, or that he had sufficient time to register under SORNA before criminal liability attached to him. *Id.* at 10a, 12a. But the court affirmed petitioner's conviction because the indictment charged that he had not registered as of July 2007, five months after the Attorney General issued his retroactivity regulation, and "[f]ive months is a sufficient grace period." *Id.* at 12a.

The court therefore rejected petitioner's Ex Post Facto Clause challenge to his conviction. *Id.* at 12a-13a.

INTRODUCTION AND SUMMARY OF ARGUMENT

A. The decision below is wrong on several levels. The most obvious is its departure from the plain statutory language. Section 2250(a)(2)(B) provides that a crime is committed by someone who, among other things, "travels in interstate or foreign commerce." The Seventh Circuit read the statute as though it says, instead, that a crime is committed by someone who "traveled in interstate or foreign commerce years ago." But that, very simply, is not how Congress wrote SORNA.

There is no mystery about the meaning of the word "travels"; in ordinary usage it refers to current or future travel. That understanding of the word as used in SORNA is supported by the remainder of § 2250(a)(2)(B), all of which is written in the present tense so as to refer unambiguously to post-SORNA activity. This reading also is confirmed by the usual rules of statutory construction, which disfavor retroactivity and do not read ambiguities into criminal statutes so as to disfavor defendants in a manner not contemplated by Congress. And—to the extent that it is thought proper to look beyond the plain statutory text—the present-tense reading is wholly consistent with SORNA's broader statutory policy. That is enough to resolve this case.

B. Disregarding the statutory language in the manner of the Seventh Circuit did more than frustrate the intent of Congress, however; it also rendered SORNA unconstitutional under the Ex Post Facto Clause as applied to persons like petitioner, in

one of two respects. If compliance with SORNA presently requires no more than satisfaction of the preexisting Wetterling Act registration requirement (as the government argued below) and if no post-SORNA travel is required to establish a violation of § 2250(a)(2)(B), SORNA simply, and impermissibly, enhances the punishment for a pre-SORNA crime. If, instead, SORNA is thought to require a post-enactment act of registration but post-SORNA interstate travel need not be shown under § 2250(a)(2)(B) (as the court below held), the statute's failure to give persons like petitioner a registration grace period made them guilty of a crime at the moment of the statute's enactment, which also is impermissible. Either understanding of the statute poses a serious constitutional concern.

The court of appeals sought to resolve this problem by rewriting the statute, reading SORNA to require registration within a "reasonable time" after enactment. But this judicial law-making was too clever by half, establishing a vague and indefinite rule that will multiply SORNA's interpretive difficulties. There was no need to strain for a creative solution to the problems posed by twisting "travels" to mean "traveled long ago"; it suffices to read the statute as Congress wrote it.

ARGUMENT

I. SECTION 2250(a)(2)(B) APPLIES ONLY TO PERSONS WHO TRAVEL IN INTERSTATE COMMERCE AFTER THEY WERE REQUIRED TO REGISTER UNDER SORNA.

The Court's inquiry in this case should go no further than the plain language of § 2250(a)(2)(B), which applies to a person who "travels" in interstate

commerce. Congress's use of the present tense is unambiguous, and the statutory language accordingly should be the end of the matter. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1063-1064 (2009). Looking further, in any event, leads to the same answer. Related statutory text, the statutory structure, the usual principles of construction, and the broader statutory purpose all point toward one conclusion: Section 2250(a)(2)(B) does not reach a person whose underlying conviction for a state-law sex offense and travel in interstate commerce both predated SORNA's enactment.

A. Based On The Plain Meaning Of § 2250(a)(2)(B), The Statute Does Not Apply To A Person Who Traveled In Interstate Commerce Only Before He Was Required To Register Under SORNA.

We begin with the "travels" language of § 2250(a)(2)(B), which is dispositive here. In that provision, Congress chose to use the third-person present tense "travels": Whoever "is required to register as a sex offender" under SORNA, "*travels* in interstate or foreign commerce," and "knowingly fails to register or update a registration as required" by SORNA, commits a federal crime. 18 U.S.C. § 2250(a) (emphasis added). Although the court of appeals thought otherwise (Pet. App. 5a-6a), "Congress' use of a verb tense is significant in construing statutes." *United States* v. *Wilson*, 503 U.S. 329, 333 (1992). In particular, the Court repeatedly, consistently—and unsurprisingly—has held that statutory provisions written with present-tense verbs (like § 2250(a)(2)(B)) do not apply to past acts. See, *e.g.*, *Dole Food Co.* v. *Patrickson*, 538 U.S. 468, 478 (2003) ("We think the plain text of this provision, because it

is expressed in the present tense, requires that instrumentality status be determined at the time suit is filed."); *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248, 255 (1997) ("[T]he use of the present tense (*i.e.*, 'enters') indicates that the 'person entitled to compensation' must be so entitled at the time of settlement."); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987) ("One of the most striking indicia of the prospective orientation of the citizen suit is the pervasive use of the present tense throughout § 505."); *cf. Wilson*, 503 U.S. at 333 ("By using these verbs in the past and present perfect tenses, Congress has indicated that computation of the credit must occur after the defendant begins his sentence."). This is consistent with the Court's general approach of reading statutes in a manner that comports with "ordinary English grammar" and usage (see, *e.g.*, *Flores-Figueroa* v. *United States*, 129 S. Ct. 1886, 1890 (2009)), while rejecting constructions that run counter to "basic grammar." *Dep't of Hous. & Urban Dev.* v. *Rucker*, 535 U.S. 125, 131 (2002).[7]

In this case, the use of the present tense in the statute should be decisive. "The natural and most

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[7] Pointing to *Scarborough* v. *United States*, 431 U.S. 563 (1977), the court of appeals opined "that 'Congress's choice of verb tenses is not very revealing.'" Pet. App. 5a (quoting *Scarborough*, 431 U.S. at 571). But the Court made that observation because the statute at issue in *Scarborough* was "ambiguous at best"; its operative language was "affecting commerce," and it was not apparent to the Court that an article moving in commerce "affects commerce" only at the time of movement. See 431 U.S. at 570-571. The Court plainly did not suggest that, as a general matter, "choice of verb tenses is not revealing." *Id.* at 571.

frequent use of the present tense is in contexts of present time[,]" R.W. Burchfield, ed., *The New Fowler's Modern English Usage* 620 (3d ed. 1998), or to refer to future events. See *ibid.* ("the * * * train * * * leaves at 9.15 pm"); William Shakespeare, *King Henry IV, Part 1*, act 2, sc. 2 ("If I travel but four foot by the squier further afoot, I shall break my wind.").[8] This proposition would not seem to require elaborate proof; when Ahab ordered "Turn up all hands and make sail! [H]e travels faster than I thought * * *," the captain could hardly have been referring to the whale's travels 18 months earlier. Herman Melville, *Moby Dick* 490 (Oxford World's Classics 2008) (1851).

By contrast, the present-tense conjugation "travels" is rarely, if ever, used to refer to conduct that occurred in the past. Instead, in common usage, the past tense "traveled" is used to indicate an act of travel in the past that has already been completed, and the perfect forms "has traveled" or "had traveled" for the state of having completed such travel. See, *e.g.*, Saul Bellow, *The Adventures of Augie March* 13 (Penguin Books 1999) (1953) ("This widower traveled down from Iowa City for just the purpose of marriage, and after they were married the news came back that he locked her a prisoner in his house and made her sign away all rights of legacy."); Owen Wister, *The Virginian* 108 (Oxford World's Classics 2009) (1902) ("So we six legs in the jerky traveled harmoniously on over the rain-gutted road, getting no deeper knowledge of each other than what

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[8] The present tense may also refer to a snapshot in time in some specialized contexts where space is at a premium, as in a newspaper headline. *Fowler's* at 620 ("writer wins the Nobel prize"). But that hardly describes § 2250.

our outsides might imply."). Thus, "Congress could have phrased its requirement [in § 2250(a)(2)(B)] in language that looked to the past * * * but it did not choose this readily available option." *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 57.

Lest there be any doubt about this seemingly obvious point, the rules of construction set by Congress itself in the Dictionary Act appear to confirm that the present tense generally does not to apply to the past. One of the prescribed rules relates to the interpretation of verb tenses: "In determining the meaning of any Act of Congress, unless the context indicates otherwise * * * words used in the present tense include the future as well as the present." 1 U.S.C. § 1.[9] That Congress specifically provided that the present tense includes future conduct suggests by implication that the present tense ordinarily does *not* reach past acts. See, *e.g.*, *United States* v. *Vonn*, 535 U.S. 55, 65 (2002). Many States have enacted similar language in their codes of statutory interpretation, indicating that legislatures commonly expect the present tense to include the future but not the past.[10]

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[9] Congress enacted that provision when revising and codifying Title 18 of the United States Code, the "Crimes and Criminal Procedure" title, under which petitioner was prosecuted. Act of June 25, 1948, ch. 645, sec. 6, 62 Stat. 683, 859-860. That Congress provided these rules in the context of codifying Title 18 suggests that they should have special force in the criminal context.

[10] Compare 1 U.S.C. § 1 ("words used in the present tense include the future as well as the present") with Ariz. Rev. Stat. Ann. § 1-214(A) (2002); Cal. Civ. Code § 14 (West 2007); Colo. Rev. Stat. Ann. § 2-4-104 (West 2008); Ga. Code Ann. § 1-3-1(d)(7) (Supp. 2009); Idaho Code Ann. § 73-114 (2006); 5 Ill. Comp. Stat. Ann. 70/1.02 (West 2005); Iowa Code Ann. § 4.1 (West 2008 & Supp. 2009); Minn. Stat. Ann. § 645.08 (West

Statutory interpretation treatises are to the same effect. See 2B Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 49:2 (7th ed. 2009). And that is enough to dispose of this case: The language of § 2250(a)(2)(B) simply does not reach travel occurring years ago, before SORNA and its registration requirement were even a twinkle in the congressional eye.

B. The Whole Act Supports The Plain Meaning Of Section 2250(a)(2)(B).

In disagreeing with this proposition and opposing the petition for certiorari, the government appeared to place emphasis on the qualifying phrase in the Dictionary Act, "unless the context indicates otherwise." Opp. 13 (emphasis omitted). But that phrase points the reader to the surrounding statutory text, or to the text of other related acts. See *Rowland* v.

Supp. 2009); Mont. Code Ann. § 1-2-105 (2009); Neb. Rev. Stat. § 49-802 (2004); Nev. Rev. Stat. Ann. § 0.030 (LexisNexis 2008); N.M. Stat. Ann. § 12-2a-5 (LexisNexis 2004); N.Y. Gen. Constr. Law § 48 (McKinney 2003); N.D. Cent. Code § 1-01-35.1 (2008); Ohio Rev. Code Ann. app. § 1.43(C) (LexisNexis 2009); Okla. Stat. Ann. tit. 25, § 26 (West 2008); 1 Pa. Cons. Stat. § 1902 (2008); S.C. Code Ann. § 2-7-30 (2005); S.D. Codified Laws § 2-14-7 (2004); Tenn. Code Ann. § 1-3-104(a) (2003); Tex. Gov't Code Ann. § 311.012(a) (Vernon 2005); Utah Code Ann. § 68-3-12(1)(d) (2008); Wis. Stat. Ann. § 990.001(3) (West 2007); Wyo. Stat. Ann. § 8-1-103(a)(iv) (2009). See also Unif. Statute & Rule Constr. Act § 5(c), 14 U.L.A. 486 (2005) ("Use of a verb in the present tense includes the future tense."). But see Ala. Code § 1-1-2 (LexisNexis 1999) ("Words used in this code in the past or present tense include the future, as well as the past and present."); Alaska Stat. § 01.10.050(a) (2008) ("Words in the present tense include the past and future tenses, and words in the future tense include the present tense."); Cal. Bus. & Prof. Code § 14 (West 2007) ("The present tense includes the past and future tenses; and the future, the present.").

Cal. Men's Colony, 506 U.S. 194, 199-200 (1993). It thus reflects the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). "Statutory interpretation * * * is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * *." *United Savings Ass'n of Tex.* v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988). And here, the structure of § 2250(a)(2)(B), the broader structure of § 2250(a), and other provisions of SORNA all compel a prospective reading of "travels."

First, the exclusive use of the present tense throughout § 2250(a)(2)(B) indicates that the provision applies only to travel that occurred after SORNA was enacted. "Where, as here, Congress uses * * * similar statutory structure in two adjoining provisions," this Court reasonably infers a similar meaning. *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009). In particular, the Court has explained that "the undeviating use of the present tense strongly suggests[] [that] the harm sought to be addressed * * * lies in the present or the future, not in the past." *Gwaltney of Smithfield, Ltd.*, 484 U.S. at 59. This rule of statutory construction accords with basic English grammar and style rules. See William Strunk, Jr. & E.B. White, *The Elements of Style* 26 (4th ed. 1999) ("The likeness of form enables the reader to recognize more readily the likeness of content and function.").

And that is just what Congress did in § 2250(a)(2)(B). The provision uses the present tense in all four of its verbs: "*travels* in interstate or for-

eign commerce, or *enters* or *leaves*, or *resides* in, Indian country" (emphasis added). This undeviating use of the present tense indicates that the provision as a whole is addressed to conduct in the present or the future, not the past. Curiously, the court of appeals found support for its holding in the "resides in Indian country" formulation, but it surely was wrong in that; "resides in" could not possibly describe someone who resided for many years in Indian country but left, never to return, before SORNA's enactment.[11] In just the same way, the present tense indicates that the first portion of § 2250(a)(2)(B) does not apply to someone who traveled in interstate commerce before SORNA's enactment, but has not done so since.

Second, the larger structure of § 2250(a) further indicates that § 2250(a)(2)(B) is targeted only at travel after SORNA's enactment. Two of the statutory elements applicable in this case could reasonably be read to apply *only* to events occurring after SORNA took effect. Section 2250(a)(1) applies to whoever "*is* required to register *under the Sex Offender Registration and Notification Act*"; and § 2250(a)(3) applies to whoever "knowingly fails to

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[11] The court of appeals thought that on our reading of the statute "a sex offender who has resided in Indian country since long before the Act was passed is subject to the Act but not someone who crossed state lines before the Act was passed. That result makes no sense * * *." Pet. App. 5a. But that logic ignores the relevant point and language. What matters is not that the offender "resided in" Indian country before the Act was passed; it is that he or she *currently "resides in"* Indian country. There is an obvious reason Congress would make nonregistration by such a person a federal offense; that person is not subject to state prosecution.

register or update a registration *as required by the Sex Offender Registration and Notification Act*." Necessarily, these provisions must refer to a post-SORNA duty and failure to register. The "travels" element, lodged between these other two (is required to register, travels in interstate commerce, and knowingly fails to register), is also most naturally read to refer to conduct post-dating enactment of SORNA.

Third, other provisions of SORNA show that Congress knew very well how to make a statutory provision retroactive where it wished to do so—and it chose *not* to do so regarding the travel element. Congress explicitly delegated authority to the Attorney General to specify the retroactive application of SORNA's civil registration requirements, a decision that Congress knew also would subject past sex offenders to the statute's criminal provisions. See SORNA § 113(d) (codified at 42 U.S.C. § 16913(d)). But Congress made no express provision for the use of past *travel* to trigger SORNA criminal prosecutions, by conferring such authority on the Attorney General or otherwise. That Congress provided the Attorney General authority to make one but not other provisions of SORNA retroactive strongly suggests that the travel element must remain prospective. See, *e.g.*, *TRW Inc.* v. *Andrews*, 534 U.S. 19, 28 (2001).

C. The Rule Of Lenity And The Presumption Against Retroactivity Counsel In Favor Of The Same Result In This Case.

1. The Rule of Lenity

The statutory language and structure thus leave little doubt that § 2250(a)(2)(B) applies only to inter-

state travel that post-dated the enactment of SORNA. If any question remained, however, the usual tools of statutory construction would lead to the same conclusion. Under the rule of lenity, courts will not adopt an interpretation of a criminal statute that is harsher than what Congress's clear expression supports. See, *e.g.*, *McNally* v. *United States*, 483 U.S. 350, 359-360 (1987). In this case, if the statutory language is ambiguous, the rule of lenity counsels against adopting the government's strained reading of § 2250(a)(2)(B).

The rule of lenity applies when, "after seizing everything from which aid can be derived," the Court can make "no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (internal quotation marks and citation omitted); see also *United States* v. *Granderson*, 511 U.S. 39, 54 (1994) (rule of lenity resolves ambiguities in favor of criminal defendants "where text, structure, and history fail to establish that the Government's position is unambiguously correct"). As we have shown, the text and structure of § 2250(a)(2)(B) are more compatible with petitioner's reading of the statutory language than with the government's favored reading. But even if that were not so, nothing about the text or legislative history of SORNA makes it clear that Congress, in enacting § 2250(a)(2)(B), affirmatively meant for that provision to apply retroactively.

The rule of lenity serves two important purposes, both of which are implicated in this case. It embodies our system's "instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *United States* v. *Bass*, 404 U.S. 336, 349 (1971) (quoting Henry J. Friendly, *Mr. Jus-*

tice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967)). And it ensures "that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment." *United States* v. *Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (opinion of Marshall, C.J.); see also Einer Elhauge, *Statutory Default Rules* 169 (2008) ("By providing the most lenient reading in unclear cases, the rule of lenity forces legislatures to define just how anti-criminal they wish to be, and how far to go with the interest in punishment crime when it runs up against other societal interests.").

Both of these principles come into play here. The statutory language cannot be thought to clearly favor the government's reading. And the court of appeals reached far beyond the plain meaning of the statute and the clear intent of Congress to ensure that § 2250(a)(2)(B) would reach the petitioner's conduct. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

2. Presumption Against Retroactivity

In addition, even if the text and structure of SORNA did not demonstrate that § 2250(a)(2)(B) applies only to prospective travel, the presumption against retroactivity compels that interpretation. See *Lindh* v. *Murphy*, 521 U.S. 320, 326 (1997). Under that presumption, reading § 2250(a)(2)(B) to attach only to prospective travel is required by the rule that "congressional enactments . . . [are not] construed to have retroactive effect unless their language requires this result." *INS* v. *St. Cyr*, 533 U.S. 289, 315-316

(2001) (quoting *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)). "The standard for finding such unambiguous direction is a demanding one." *Id.* at 316. "[C]ases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id.* at 316-317 (quoting *Lindh*, 521 U.S. at 328 n.4). In this case, however, Congress provided no statutory text indicating "with unmistakable clarity" its intent that § 2250(a)(2)(B) apply retroactively. The text is certainly not "so clear that it could sustain only" the government's interpretation. See *id.* at 317-318.

That principle governs here because the effect of § 2250(a)(2)(B) is retroactive. It "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 268-269 (1994) (quoting *Soc'y for Propagation of the Gospel* v. *Wheeler*, 22 F. Cas. 756 (C.C.N.H. 1814) (No. 13,156)). The "degree of connection between the operation of the new rule and a relevant past event" is very high, as the new rule cannot operate on petitioner without applying to the prior travel. See *Landgraf*, 511 U.S. at 270. Such an outcome is strongly disfavored.

In ruling to the contrary, the court of appeals opined that, in the criminal context, the presumption against retroactivity works only through the constitutional dictates of the Ex Post Facto Clause. Pet. App. 6a. But that is not so. As this Court explained in a case dealing with a criminal statute:

> The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially

> of the criminal sort, is not to be applied retroactively. *Quite independent* of the question whether the *Ex Post Facto Clause* bars retroactive application of [the criminal provision], then, there is the question whether Congress intended such application. Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.

Johnson v. *United States*, 529 U.S. 694, 701 (2000) (internal citations omitted) (emphasis added). See *United States* v. *Head*, 552 F.3d 640, 641 n.1 (7th Cir. 2009) ("When the statute is silent the presumption against retroactivity, particularly in criminal cases, directs us to apply the amendment prospectively. [*Johnson*, 529 U.S.] at 701-02."); see also *St. Cyr*, 533 U.S. at 324 ("As our cases make clear, the presumption against retroactivity applies far beyond the confines of the criminal law."). There is "no clear statement of that intent" here.

D. Applying § 2250(a)(2)(B)'s Travel Element Only To Post-Enactment Travel Is Consistent With SORNA's Purpose.

In nevertheless applying §2250(a)(2)(B) to past travel, the court of appeals placed heavy emphasis on what it believed to be the congressional purpose behind SORNA. Pet. App. 4a-6a. Relying on *Scarborough* v. *United States*, 431 U.S. 563 (1977), the court opined that SORNA's travel element serves only as a jurisdictional hook that establishes a "constitutional predicate for the statute" (Pet. App. 6a), and that Congress was wholly unconcerned with when a sex offender traveled in interstate commerce. We note that, even if there were anything to this observation about the supposed congressional purpose, that un-

enacted policy could not stand against the plain statutory language. In fact, however, the court of appeals is wrong even on its own terms, in several respects.

1. To begin with, in crafting a new sex offender registration system, Congress was particularly concerned that sex offenders were able to evade then-existing registration requirements by moving between jurisdictions. As one of the bill's Senate cosponsors explained, SORNA was designed to "sew together the patch-work quilt of 50 different State attempts to identify and keep track of sex offenders." 152 Cong. Rec. S8012 (daily ed. July 20, 2006) (statement of Sen. Hatch); see also 152 Cong. Rec. S8012, 8013 (daily ed. July 20, 2006) (statement of Sen. Biden) ("This is about uniting 50 States in common purpose and in league with one another to prevent these lowlifes from slipping through the cracks."). The "lack of basic uniformity and effective operation among the various States in administering sex registry programs" made it possible for sex offenders to avoid registering by moving between jurisdictions (H.R. Rep. No. 109-218, pt. 1, at 24 (2005)), and SORNA was designed to close this "loophole in the sex offender * * * registration program." *Id.* at 167 (statement of Rep. Sensenbrenner); see also 152 Cong. Rec. S8030 (daily ed. July 20, 2006) (statement of Sen. Frist) (observing that "[l]oopholes in the current [registration] system allow some sexual predators to evade law enforcement").

In this context, far from serving as from a mere "constitutional predicate" for a general federal sex offender registration requirement (Pet. App. 6a), addressing interstate travel by unregistered sex offenders was *itself* an important part of the "mischief"

SORNA "was enacted to end." *Guaranty Trust Co.* v. *Henwood*, 307 U.S. 247, 257 (1939).[12] Indeed, the legislative history's frequent reference to inter-jurisdictional problems is particularly striking given that these problems related to only one part of the much larger Adam Walsh Act, a bill both Houses of Congress passed by voice vote and that generated only forty minutes of debate in the House. See 152 Cong. Rec. S8031 (daily ed. July 20, 2006) (passing Senate by voice vote); 152 Cong. Rec. H692 (daily ed. March 8, 2006) (passing House by voice vote); 152 Cong. Rec. H676 (daily ed. March 8, 2006) (allocating forty minutes for debate in the House).

Effectuating this purpose dictated an emphasis on *post*-SORNA travel. Rather than creating a fully

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[12] Had Congress intended § 2250(a)(2)(B)'s travel element to operate merely as a jurisdictional hook for a general federal registration requirement, surely it would have grounded the registration requirement in its broader authority to regulate activities that "substantially affect" interstate commerce. *United States* v. *Lopez*, 514 U.S. 549, 559 (1995). Other parts of the Adam Walsh Act presume that sexual violence substantially affects interstate commerce. See SORNA § 302, 120 Stat. at 619-622 (codified at 18 U.S.C. §§ 4241, 4247-4248) (creating a federal civil commitment program for sexually dangerous prisoners without providing any jurisdictional hook). Moreover, SORNA's registration requirement is codified separately from § 2250 and does not itself include an interstate travel element. See 42 U.S.C. § 16913. Sex offenders are required to register under § 16913 irrespective of whether they ever travel in interstate commerce or are exposed to potential criminal liability under § 2250. Considering the Adam Walsh Act as a whole, it thus is not possible that Congress believed its authority to require sex-offender registration was limited by its power to regulate the channels of interstate commerce—which indicates that the travel element of § 2250 serves a substantive and not a jurisdictional purpose.

federal registration scheme, SORNA establishes "uniform standards" for state registration programs. 152 Cong. Rec. S8022 (daily ed. July 20, 2006) (statement of Sen. DeWine). Thus, SORNA imposes a baseline set of data that States must gather when registering sex offenders (§ 114, 120 Stat. at 594), directs which state crimes must trigger registration requirements (§ 111, 120 Stat. at 591-593), and requires States to provide the Attorney General with information about sex offenders who fail to comply. § 112, 120 Stat. at 597-598. The premise of these reforms is that "cooperation and coordination among the various States improves the effectiveness of each State's registry." 152 Cong. Rec. S8029 (daily ed. July 20, 2006) (statement of Sen. Leahy).

In the absence of § 2250(a) liability, however, post-enactment travel would pose a threat to SORNA's uniform system of state registration requirements. Under the previously uncoordinated system, sex offenders might avoid apprehension and criminal liability for failure to register by repeatedly moving between jurisdictions. Congress included § 2250(a)(2)(B) to address this concern. See 151 Cong. Rec. H7890 (daily ed. Sept. 14, 2005) (statement of Rep. Keller) (observing that "[n]early 100,000 sex offenders remain unregistered and are moving freely about the country"). But there was no need to create a federal criminal statute to provide for punishment of sex offenders who failed to register but had traveled in interstate commerce only prior to SORNA's enactment; these offenders will be subject to state prosecution pursuant to the new statutes, carrying enhanced penalties, that SORNA directs the States to enact.

In contrast to post-enactment travel, pre-enactment travel does not jeopardize SORNA's overall implementation. An unregistered sex offender who has previously traveled in interstate commerce is no different from an unregistered sex offender who has not: both are outside the registration system, both are unknown to local law enforcement, and both are subject to prosecution under SORNA-mandated state registration laws. Yet the government's reading of § 2250 presumes that Congress arbitrarily distinguished between these two identically-situated individuals, imposing a harsh new federal penalty on the former while leaving the latter to be prosecuted under state law. There is no reason to believe that Congress intended such a distinction.[13]

Had Congress meant to establish a federal crime for failure to register that would have reached all then-unregistered sex offenders, it could have done so by simply omitting § 2250(a)(2)(B)'s travel element, as it has omitted any travel predicate from the basic SORNA registration requirement. In rejecting

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[13] General statements in the legislative history that SORNA "cracks down on those sex offenders who refuse to follow registration requirements" do not suggest a different result. 151 Cong. Rec. H7890 (daily ed. Sept. 14, 2005) (statement of Rep. Keller). "'The Act must do everything necessary to achieve its broad purpose' is the slogan of the enthusiast, not the analytical tool of the arbiter." *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting); see also *Clackamas Gastroenterology Assocs., P.C.* v. *Wells*, 538 U.S. 440, 447 (2003) (rejecting reading of statute that comported with its general purpose where this reading was inconsistent with Congress's more specific policy choices). Congress's general intent to punish sex offenders who fail to register sheds little light on the question whether it specifically intended to create § 2250(a) liability for pre-enactment travel.

this course, Congress chose to rely instead on a federally coordinated state registration scheme. To read § 2250(a)(2)(B) as reaching past travel would frustrate Congress's choice of means by creating a broader federal crime than the one Congress intended.

2. The court of appeals nevertheless supported its conclusion by pointing to what it described as the "close analogy" of *Scarborough*, which held that a convicted felon may be punished for possession of a firearm under the statute currently codified at 18 U.S.C. § 922(g)(1) even when the gun had crossed state lines prior to the time that the defendant became a felon. *Scarborough*, however, actually points clearly away from the Seventh Circuit's conclusion.

The statute at issue in *Scarborough* used language that differed materially from that of § 2250(2)(2)(B). Rather than refer simply to "travel in" commerce, the felon-in-possession law permitted punishment of a felon who "receives, possesses, or transports in commerce *or affecting commerce* . . . any firearm." 431 U.S. at 564 (quoting 18 U.S.C. app. § 1202(a) (1976) (currently codified at 18 U.S.C. § 922(g)(1)) (emphasis added)). The Court reasoned that "the phrase 'affecting commerce'" was of central importance in construing the reach of the felon-in-possession statute; express statutory findings indicated that receipt, possession, or transportation of firearms by felons constitutes "a burden on commerce or threat affecting the free flow of commerce," and Congress "implemented those findings by prohibiting possessions 'in commerce and affecting commerce.'" *Id.* at 571. This choice of language was significant: "Congress is aware of the distinction between legislation limited to activities in commerce

and an assertion of its full Commerce Clause power so as to cover all activity substantially affecting interstate commerce." *Ibid.* (citation and internal quotation marks omitted). This understanding was buttressed by legislative history indicating that Congress actually sought to "outlaw the mere possession of weapons." *Id.* at 572 (citation and internal quotation marks omitted). This purpose, reflected in the breadth of the statutory language, led the Court to conclude that Congress's focus was on the felon's possession (or receipt or transfer) of a weapon, and not on *when* the felon encountered the weapon.

In contrast, 18 U.S.C. § 2250(a)(2)(B) *is* limited to activity "in commerce." It contains no language (or history) indicating that Congress meant to legislate to the full scope of its Commerce Clause power. The statute does not contain the phrase "affecting commerce," which would have indicated such an intent. Rather, by imposing the travel element of § 2250(a)(2)(B), Congress exercised its authority to regulate "the channels of interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995), excluding from those channels sex offenders who knowingly fail to register. That power is inherently prospective, as the statutory language itself indicates. While Congress has authority to keep the channels of interstate commerce free from immoral and injurious uses, it cannot possibly keep these channels free from *prior* misuse that occurred before enactment of the governing statute. Nothing in *Scarborough* supports a different conclusion.

3. Moreover, applying § 2250(a)(2)(B)'s "travels in commerce" language retrospectively so that it serves as a broad jurisdictional hook has very curious consequences. If the "travels" element of § 2250 does not

refer to travel that post-dates the enactment of SORNA or the attachment of the SORNA registration requirement, nothing in the statutory language can plausibly be read to impose *any* temporal limit on when that travel must have taken place. Thus, if the reader is free to ignore the present tense used in the statutory text, and if the travel need not have been undertaken by someone required at the time to register under SORNA, the statutory language would seem to mean that interstate travel undertaken at *any* point during the offender's lifetime would suffice; it would be enough for the defendant to have crossed a state line on the way home from the hospital as an infant and to have committed a sex offense forty years later. A Congress concerned with effects on commerce (to preserve the statute's constitutionality or for any other reason) could not have had such an outcome in mind—and the Court should avoid a construction that would lead to such an absurd result. See generally *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 527 (1989) (Scalia, J., concurring); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).

II. IF § 2250(a)(2)(B)'s TRAVEL ELEMENT REFERS TO TRAVEL PREDATING ENACTMENT OF SORNA, THE STATUTE VIOLATES THE EX POST FACTO CLAUSE

If the Court does not adopt the plain meaning of § 2250 and instead interprets "travels" to include travel that predated SORNA's enactment, SORNA's criminal provision will violate the Constitution's prohibition against ex post facto laws. U.S. Const. Art. I, § 9. The Court has established that "two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that

is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981) (internal citation omitted). Under the court of appeals' reading of SORNA, both of these considerations are present in the prosecution of persons whose sex offenses and travel occurred prior to the enactment of the statute.

The ex post facto problem emerges in one of two ways, depending on whether the government is correct in its view (expressed below but not in its opposition to certiorari) that, during the interval when States are not compliant with SORNA, satisfaction of SORNA's registration requirement demands nothing more than registration under the pre-existing Wetterling Act. If that view is correct, § 2250 simply enhances the punishment for a completed failure to register under the Wetterling Act. On this understanding of SORNA, a person in petitioner's situation was required to register in precisely the same way pre- and post-SORNA; he traveled before SORNA; and he had become noncompliant with the Wetterling regime before the enactment of SORNA. Each element was complete, subjecting him to prosecution for a crime with a maximum penalty of *one* year's imprisonment, before SORNA applied to him. The enactment of SORNA added no additional obligation. In these circumstances, adding exposure to an additional nine years' imprisonment for that same completed crime violates the Ex Post Facto Clause.

Were the government to try avoiding this problem by taking the position that registration "under" and "as required by" SORNA constitutes a new duty that actually did differ from the one existing under the pre-SORNA regime, as the Seventh Circuit

seems to have held, it would create a different constitutional problem. On that reading, petitioner was *immediately* in violation of SORNA upon enactment of the statute (or upon promulgation of the Attorney General's regulation applying SORNA to past sex offenders), with no fair opportunity to avoid liability. That, too, would violate the Ex Post Facto Clause and related due process principles. Interpreting the "travels" element to apply only to post-SORNA travel, however, resolves these constitutional difficulties as to persons like petitioner.[14]

A. Application Of SORNA's Criminal Provision To Petitioner Violates The Ex Post Facto Clause Because It Retroactively Increases Punishment For His Failure To Register Under the Wetterling Act

We begin with the government's understanding of SORNA's requirements during the period while States are not in compliance with the statute. SORNA creates a number of new registration requirements beyond those imposed by prior law, including new forms of required information and mandatory in-person registration. The statute's criminal provision then punishes knowing failure to register "as required by" SORNA, which one might suppose refers to failure to provide in person *all* of the information required. But satisfaction of these new requirements is literally impossible almost everywhere

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[14] We note that the travel element does not apply to prosecution for nonregistration under SORNA of offenders who committed *federal* sex offenses, although the prosecution of such persons may raise similar ex post facto issues. The question how, or whether, SORNA prosecutions may constitutionally proceed against such persons is not presented by this case.

because 49 States have not yet created SORNA-compliant registries. See U.S. Dep't of Justice, Press Release, *Justice Department Announces First Two Jurisdictions to Implement Sex Offender Registration and Notification Act* (Sept. 23, 2009) (announcing Ohio and the Confederated Tribes of the Umatilla Indian Reservation as first jurisdictions to substantially implement SORNA), available at http://www.ojp.usdoj.gov/smart/pdfs/smart09154.pdf.

The government accordingly has prosecuted cases on the theory that compliance with SORNA, at present, requires nothing more than compliance with the pre-SORNA Wetterling Act registration regime. As the government argued below in the case consolidated with petitioner's, a SORNA defendant "was already notified of his registration obligations [under Wetterling], and *SORNA did nothing to change those obligations.*" Gov't C.A. Br. at 17, *United States* v. *Dixon* (No. 08-1438) (emphasis added). According to the government, "[w]hether the states' registries are in compliance with SORNA is immaterial" to SORNA criminal liability (*id.* at 20), and "it is not an element of that offense that the defendant register and provide the whole panoply of information that is required by SORNA." Oral Argument, *Dixon*, recording available at http://www.ca7.uscourts.gov. In the government's view, "[a] sex offender is able to comply with SORNA even if not a single state implements SORNA's registry requirements, so long as his jurisdiction provides a means to register as a sex offender." Gov't C.A. Br. at 20, *Dixon*. As noted above (at 11), the courts uniformly have accepted this understanding of what compliance with SORNA currently requires.

As we understand it, the government thus takes the position that, for persons already registered under the Wetterling Act, compliance with SORNA imposes *no* new obligations; satisfaction of the preexisting statutory registration requirement means that those persons are not subject to prosecution under SORNA. And for persons like petitioner, who had not been in compliance with the Wetterling Act at the time of SORNA's enactment, the almost universal failure of the States to create SORNA compliant registries meant that SORNA could, as a practical matter, have required them to do nothing more than what they already had been required to do when SORNA went into force. In these circumstances, the elements of the Wetterling Act and the SORNA criminal offenses are identical: the Wetterling Act (as amended) subjects to a maximum of one year's imprisonment someone who is "required to register," "chang[es] address to a State other than the State in which [he] resided at the time of the immediately preceding registration," 42 U.S.C. § 14072(g)(3), and knowingly fails to comply with those obligations, *id.* § 14072(i).

Petitioner, however, was charged under § 2250, a felony with a maximum penalty a full order of magnitude greater than that of the Wetterling Act misdemeanor; he ultimately received a 30-month sentence. By adding no new element to a completed crime while imposing a longer sentence of imprisonment, prosecutions of this sort offend the Ex Post Facto Clause.[15] It is a settled principle that the

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[15] The problem would not be avoided if, in a given case, a defendant received a SORNA sentence that is within the maximum for a Wetterling Act violation because the Ex Post Facto analy-

Clause prohibits "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). See *Collins* v. *Youngblood*, 497 U.S. 37, 43 (1990) ("[l]egislatures may not retroactively * * * increase the punishment for criminal acts."); *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981) (law in question unconstitutionally "increase[d] punishment beyond what was prescribed when the crime was consummated"); *Dobbert* v. *Florida*, 432 U.S. 282, 294 (1977) (upholding statute against ex post facto challenge because it did not increase the "quantum of punishment attached to the crime"). But as a practical matter, that is, in the government's view, just what Congress did in SORNA: application of SORNA to petitioner thus "aggravates" his crime and "makes it greater than it was when committed." *Calder*, 3 U.S. at 390.

B. Retroactive Application Of SORNA's Criminal Provision To Petitioner Violates The Ex Post Facto Clause Because It Does Not Provide Any Opportunity To Avoid Criminal Punishment

We suppose that the government might attempt to avoid this trap by insisting, as it appeared to suggest in its opposition to certiorari (at 18-19), that SORNA does add some additional element to the nonregistration crime beyond that constituting a Wetterling Act violation. If so, however, it skips from Scylla to Charybdis. On this construction of the statute, petitioner had *no* opportunity to avoid liability

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sis turns on the maximum possible, not the actual, term imposed. See *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937).

for the supposedly new SORNA felony. Such an outcome denies petitioner the "fair notice" that is "[c]ritical to relief under the Ex Post Facto Clause" (*Weaver*, 450 U.S. at 30-31) and offends basic precepts of due process: "A statute which denies the affected party a reasonable opportunity to avoid the consequences of noncompliance may work an injustice similar to that of invalid retroactive legislation. In both instances, the party who 'could have anticipated the potential liability attaching to his chosen course of conduct would have avoided the liability by altering his conduct.'" *Hodel* v. *Irving*, 481 U.S. 704, 733 n.18 (1987) (Stevens, J., concurring); *cf. Lambert* v. *California*, 355 U.S. 224 (1957) (providing "no opportunity to comply with the law and avoid its penalty" violates the Due Process Clause).

As a practical matter, SORNA provides adequate notice and an opportunity to comply with its registration requirement for persons convicted of a sex offense *after* the statute went into effect. Such persons are instructed to register "before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement" or "not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment." 42 U.S.C. § 16913(b)(1)-(2). An offender is also required to update his or her registration "not later than 3 business days after each change of name, residence, employment, or student status." *Id.* § 16913(c).

But for persons like petitioner, who completed their incarceration and changed residence before SORNA was enacted, the normal time frame for registration provided by the statute expired *before* the registration requirement was imposed. The Attorney

General's regulation applying SORNA retroactively to such persons does not provide an extension of time within which they may register. Although Congress authorized the Attorney General to "specify the applicability of" SORNA registration "to sex offenders convicted before the enactment" of SORNA "or its implementation in a particular jurisdiction, *and to prescribe rules for the registration of any such sex offenders*" (42 U.S.C. § 16913(d) (emphasis added)), the regulation actually promulgated did not address the means or timing of registration; for such persons, the regulation does not provide any process or extended time limit for completing registration. See 28 C.F.R. § 72.3; see also Pet. App. at 10a. ("The regulation just says that such persons have to register. It doesn't say by when."). But without a prospective time interval in which to register, the statutory text made individuals such as petitioner *immediately* guilty of failing to register under SORNA at the moment the Attorney General's retroactivity regulation took effect.

This point would not seem debatable. The Seventh Circuit acknowledged that "[i]t would hardly be reasonable to require that [an offender] have registered no later than February 28[, 2007], since that was the day on which the interim regulation, subjecting him to the Act, was issued," and that "[w]hatever the minimum grace period required to be given a person who faces criminal punishment for failing to register as a convicted sex offender is, it must be greater than zero." Pet. App. 10a, 12a. (The court's solution to this problem, which we address below, was to invent an extra-statutory time period within which sex offenders would be permitted to register.)

And the Attorney General himself recognized that SORNA provides no time interval for compli-

ance to those whose offense and interstate travel occurred prior to SORNA's enactment. In the July 2008 National Guidelines for Sex Offender Registration and Notification, promulgated under 42 U.S.C. § 16912(b), the Attorney General discussed retroactive application of SORNA to those convicted of a sex offense prior to SORNA's enactment. The guidelines provide the following example:

> A sex offender convicted by a state for an offense in the SORNA registration categories * * * is not registered near the time of sentencing or before release from imprisonment, because the state did not require registration for the offense in question at that time. The state subsequently implements SORNA in 2008, which will include registering such a sex offender. But it is *impossible* to do so near the time of his sentencing or before his release from imprisonment, *because that time is past.*

72 Fed. Reg. at 38,063 (emphasis added).[16] Hence the Attorney General recognized that, insofar as SORNA registration is not coextensive with Wetterling Act registration, retroactive application of SORNA im-

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[16] Similarly: "[A] person convicted of a sex offense by an Indian tribal court in, e.g., 2005 may have not been registered near the time of sentencing or release because the tribe had not yet established any sex offender registration program at the time. If the person remains under supervision when the tribe implements SORNA, registration will be required by the SORNA standards, *but the normal time frame for initial registration under SORNA will have passed some years ago, so registration within that time frame is impossible.*" 73 Fed. Reg. at 38,063 (emphasis added).

poses an impossible duty on both the offender and the registering State.

Of course, such persons ultimately would be able to come into compliance. They would, however, have been out of compliance for some period and therefore subject to prosecution. And subjecting someone to criminal liability that cannot be avoided is the essence of what is prohibited by the Ex Post Facto and Due Process Clauses. *Cf. Robinson* v. *California*, 370 U.S. 660, 666 (1962) (holding unconstitutional under the Eighth Amendment a statute which makes the "status" of narcotic addiction a criminal offense); *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 169 (1972) (finding a vagrancy law void for vagueness because it did not give fair notice).

III. TO AVOID AN UNCONSTITUTIONAL RESULT, THE COURT SHOULD INTERPRET § 2250(a)(2)(B) TO APPLY ONLY TO INTERSTATE TRAVEL THAT OCCURS AFTER A PERSON IS REQUIRED TO REGISTER UNDER SORNA.

For the reasons just explained, there is an "exceeding real" possibility that § 2250(a)(2)(B), if applied to pre-SORNA travel, leads to an unconstitutional result. Henry J. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, in *Benchmarks* 211 (1967). As we also have noted, the court of appeals acknowledged this problem. That reality provides an imperative to read § 2250(a)(2)(B) in accord with its plain terms, as applying to post-SORNA travel; such a construction is not only the most natural understanding of the statutory text, but also the approach compelled by the rule that, "[w]hen the constitutionality of a statute is challenged, this Court first ascertains whether the statute can be

reasonably construed to avoid the constitutional difficulty." *Ellis* v. *Bhd. of Ry., Airline & S.S. Clerks*, 466 U.S. 435, 444 (1984); see also *Nw. Austin Mun. Util. Dist. No. 1* v. *Holder*, 129 S. Ct. 2504, 2513 (2009) ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.") (quoting *Escambia County* v. *McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, 541 (1979) ("[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.") (citing *Murray* v. *The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)).[17]

Rather than embrace this straightforward way of avoiding the constitutional problem, however, the court of appeals determined to rewrite SORNA, inventing its own statutory structure. Recognizing that SORNA does not provide an express period to register for persons whose offense and travel occurred prior to enactment, the court looked "[b]y analogy to contract offers that do not specify a deadline for acceptance," concluding that persons in this position should "have to register within a reasonable time."

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[17] Reading § 2250(a)(2)(B) as applying only to travel that occurs after promulgation of the Attorney General's regulation would cure the constitutional infirmity at issue here: Pre-SORNA sex offenders who violated state law and therefore are subject to § 2250(a)(2)(B) could avoid criminal liability by registering within three business days of traveling in interstate commerce *after SORNA applied to them*. See *McDonald* v. *Massachusetts*, 180 U.S. 311 (1901) (recidivism statute did not violate the Ex Post Facto Clause because one element of the offense was commission of a crime after the statute's enactment).

Pet. App. 10a. But this approach creates its own set of problems.

First, "[t]he canon of constitutional avoidance does not supplant traditional modes of statutory interpretation." *Boumediene* v. *Bush*, 128 S. Ct. 2229, 2271 (2008). When adopting a saving construction, a court remains bound by the statute's text and it is inappropriate to "press statutory construction 'to the point of disingenuous evasion' even to avoid a constitutional question." *United States* v. *Locke*, 471 U.S. 84, 96 (1985) (quoting *George Moore Ice Cream Co.* v. *Rose*, 289 U.S. 373 (1933)). Yet the Seventh Circuit's interpolation of a "reasonable time" to register has no basis in the statutory text. SORNA provides a set of registration procedures and time limits to be followed by persons convicted of a sex offense *after* its enactment. See 42 U.S.C. § 16913(b). But Congress did not specify procedures that might be required of persons with pre-SORNA offenses, leaving that to the Attorney General. See *id.* § 16913(d). That the Attorney General has failed to address the problem is no justification for a court to write its own regulation and decide what, if any, "reasonable time" for registration might be built into the system.[18]

Second, and relatedly, the Seventh Circuit's exercise in judicial lawmaking simply multiplied, in sorcerer's apprentice fashion, the interpretive diffi-

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[18] It is notable in this regard that the United States did not seek certiorari from the adverse judgment in the companion appeal below, notwithstanding the Seventh Circuit's having found an Act of Congress unconstitutional as applied to a significant number of people. If the Attorney General agrees with the Seventh Circuit, he presumably could promulgate a regulation extending a "reasonable time" rule to all jurisdictions.

culties presented by SORNA. As Justice Frankfurter noted:

> There are * * * fundamental objections to loose judicial reading. In a democracy the legislative impulse and its expression should come from those popularly chosen to legislate, and equipped to devise policy, as courts are not. The pressure on legislatures to discharge their responsibility with care, understanding and imagination should be stiffened, not relaxed. Above all, they must not be encouraged in irresponsible or undisciplined use of language.

Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 527, 545-546 (1947).

This case illustrates the wisdom of Justice Frankfurter's observation. Accepting the court of appeals' "reasonable time" construction would require lower courts to engage in common-law "judicial lawmaking without any guidance from Congress." *Cedar Rapids Cmty. Sch. Dist.* v. *Garret F. by Charlene F.*, 526 U.S. 66, 77 (1999). In any case involving a defendant in the same position as petitioner, the district court would have to confront a series of questions with no clear answers. How long is a constitutionally sufficient "reasonable time"? (The Seventh Circuit did not say, holding only that in the case of petitioner five months was a reasonable time and that in the case of co-appellant Dixon one day was not. See Pet. App. 10a-11a, 12a). Does the "reasonable time" element include a *mens rea* requirement? Does it differ for those whose interstate travel preceded SORNA's enactment? For those who either did not or were not required to register under the Wetterling Act? Will a State's failure to establish a regis-

tration system as required by SORNA extend the registration period? A saving construction that permits SORNA's retroactive application so long as a defendant had a "reasonable" time to comply thus does not serve "to *avoid* the decision of constitutional questions," but instead *creates* an entirely new set of constitutional and interpretive problems. *Clark* v. *Suarez Martinez*, 543 U.S. 371, 381 (2005).

That is not an appropriate way to interpret a statute in the face of constitutional doubt when a more straightforward solution is available. The purpose of the avoidance doctrine is to simplify judicial decision-making, not to complicate it unnecessarily. See Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-1961 (1997). The avoidance canon presumes "that Congress did not intend the alternative which raises serious constitutional doubts." *Clark*, 543 U.S. at 381. For persons prosecuted under § 2250(a)(2)(b), reading the travel element to encompass only post-enactment travel accomplishes that purpose. That is all that is necessary to resolve this case—and "if it is not necessary to decide more, it is necessary not to decide more." *PDK Labs., Inc.* v. *U.S. DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring). The court of appeals erred in doing so.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

DAN M. KAHAN
THOMAS W. MERRILL
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602
Counsel for the Petitioner

DECEMBER 2009

APPENDIX

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Article I, § 9 of the United States Constitution provides, in relevant part:

> No * * * ex post facto law shall be passed.

The registration provision of the Sex Offender Registration and Notification Act ("SORNA"), title I of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. 109-248, § 113, 120 Stat. 587, 593-594 (codified at 42 U.S.C. § 16913), provides:

> REGISTRY REQUIRMENTS FOR SEX OFFENDERS.
>
> (a) IN GENERAL.—A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.
>
> (b) INITIAL REGISTRATION.—The sex offender shall initially register—
>
> (1) before completing a sentence of imprisonment with respect to the offence giving rise to the registration requirement; or
>
> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) KEEPING THE REGISTRATION CURRENT.—A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that information to all other jurisdictions in which the offender is required to register.

(d) INITIAL REGISTRATION OF SEX OFFENDERS UNABLE TO COMPLY WITH SUBSECTION (b).—The Attorney General shall have the authority to specify the applicability of the requirements of this title to sex offenders convicted before the enactment of this Act or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

(e) STATE PENALTY FOR FAILURE TO COMPLY.—Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that is greater than 1 year for the failure of a sex offender to comply with the requirements of this title.

SORNA's criminal provision, Pub. L. 109-148, § 141, 120 Stat. at 601-602, codified at 18 U.S.C. § 2250, provides in relevant part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2) (A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless

> disregard of the requirement to comply; and
>
> (3) the individual complied as soon as such circumstances ceased to exist. * * *

The Attorney General's regulation applying SORNA's registration requirements to persons convicted before SORNA's enactment, 72 Fed. Reg. 8896 (2008), codified at 28 C.F.R. § 72.3, provides in relevant part:

> The requirements of the Sex Offender Registration and Notification Act apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act.
>
> * * *
>
> *Example 2.* A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of the Sex Offender Registration and Notification Act, the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under the Sex Offender Registration and Notification Act to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. [§]2250 for the violation because he traveled in interstate commerce.

RESPONDENT'S BRIEF

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

ELENA KAGAN
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 2250(a), which imposes criminal penalties on certain sex offenders who travel in interstate commerce and knowingly fail to register or update a registration as required by the Sex Offender Registration and Notification Act (SORNA), 42 U.S.C. 16901 *et seq.*, applies to petitioner, whose interstate travel occurred after his conviction for a sex offense that triggers a registration requirement, but before SORNA's enactment.

2. Whether the Ex Post Facto Clause precludes a prosecution under Section 2250(a) of a person whose underlying sex offense and interstate travel predated SORNA's enactment, but whose failure to register occurred well after SORNA's requirements became applicable to him.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 551 F.3d 578. The opinion of the district court (Pet. App. 14a-19a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 2008. On March 12, 2009, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including April 22, 2009, and the petition was filed on that date. The petition for a writ of certiorari was granted on September 30, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 3 of the United States Constitution provides: "No Bill of Attainder or ex post facto Law shall be passed."

Pertinent statutory provisions are set forth in an appendix to this brief. App., *infra*, 1a-26a.

STATEMENT

Following a conditional guilty plea in the United States District Court for the Northern District of Indiana, petitioner was convicted of failing to register or to update his registration as a convicted sex offender, in violation of 18 U.S.C. 2250(a). Pet. App. 1a-2a. He was sentenced to 30 months of imprisonment, to be followed by three years of supervised release. Amended Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-13a.

1. "Sex offenders are a serious threat in this Nation," in large part because "the victims of sexual assaults are most often juveniles" and because "convicted sex offenders * * * are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *McKune* v. *Lile*, 536 U.S. 24, 32-33 (2002) (plurality opinion); see *Smith* v. *Doe*, 538 U.S. 84, 103 (2003) (noting "grave concerns over the high rate of recidivism among convicted sex offenders and their dangerousness as a class"). As a result, Congress has frequently enacted legislation to encourage and assist States to keep track of sex offenders' addresses and to make information about sex offenders available to the public "for its own safety." *Id.* at 99; see also *id.* at 103 (notification "alert[s] the public to the risk of sex offend-

ers in their communit[y]") (citation omitted; brackets in original).

By 1993, 24 States had already passed sex-offender-registration laws, which became known as "Megan's Laws," after Megan Kanka, a seven-year-old girl who was sexually assaulted and murdered in 1994 by a neighbor who, unbeknownst to her family, had prior convictions for sex offenses against children. See *Smith*, 538 U.S. at 89; 139 Cong. Rec. 31,251 (1993) (statement of Rep. Ramstad). In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Wetterling Act), Pub. L. No. 103-322, § 170101, 108 Stat. 2038 (42 U.S.C. 14071). Among other things, the Wetterling Act encouraged States as a condition of receiving federal funding to adopt sex-offender-registration laws meeting certain minimum standards. See *Smith*, 538 U.S. at 89-90. "By 1996, every State, the District of Columbia, and the Federal Government had enacted some variation of Megan's Law." *Id.* at 90. Within the same period, Congress had added a mandatory community notification provision to the Wetterling Act's minimum national standards, see Megan's Law, Pub. L. No. 104-145, 110 Stat. 1345. Congress had also further strengthened the national effort to ensure registration of sex offenders by directing the Federal Bureau of Investigation to create a national sex offender database, requiring lifetime registration for certain offenders, and making the failure of certain persons to register subject to a penalty of up to one year of imprisonment (in the case of a first offense) or ten years (in the case of a second or subsequent offense), see Pam Lychner Sexual Offender Tracking and Identification Act, Pub. L. No. 104-236, § 2, 110 Stat. 3093 (42 U.S.C. 14072).

Later statutes further enhanced registration and notification requirements. See, *e.g.*, Campus Sex Crimes Prevention Act, Pub. L. No. 106-386, § 1601, 114 Stat. 1537 (requiring sex offenders to provide notice concerning institutions of higher education at which they work or are students); Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 604, 117 Stat. 688 (requiring States to make sex-offender-registry information available on the Internet).

Despite those considerable legislative efforts, by 2005, Congress became concerned about "loopholes and deficiencies" in the various registration and notification statutes around the country. H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 20 (2005) (*House Report*). One source of particularly grave concern was an estimate that as many as 100,000 sex offenders were "missing," in the sense that their locations were unknown both to law enforcement and to the other residents of their communities. *Id.* at 26. The House Judiciary Committee described the problem of "missing" sex offenders as "[t]he most significant enforcement issue in the sex offender program," and it recognized that a sex offender "typically" went missing by "mov[ing] from one State to another." *Ibid.* The Committee concluded that "there is a strong public interest in finding" those missing sex offenders "and having them register with current information to mitigate the risks of additional crimes against children." *Id.* at 24.

On July 27, 2006, Congress responded to those (and other) concerns by enacting the Sex Offender Registration and Notification Act (SORNA), Pub. L. No. 109-248, Tit. I, 120 Stat. 590 (42 U.S.C. 16901 *et seq.*). SORNA was "generally designed to strengthen and increase the

effectiveness of sex offender registration and notification for the protection of the public," as well as "to eliminate potential gaps and loopholes under the pre-existing standards by means of which sex offenders could attempt to evade registration requirements or the consequences of registration violations." Office of the Att'y Gen., U.S. Dep't of Justice, *Applicability of the Sex Offender Registration and Notification Act*, 72 Fed. Reg. 8894, 8895 (2007). In furtherance of those ends, SORNA "establishe[d] a comprehensive national system for the registration of [sex] offenders." 42 U.S.C. 16901.

In general, SORNA requires every sex offender to "register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student." 42 U.S.C. 16913(a). It defines a "sex offender" as "an individual who was convicted of a sex offense" that falls within the statute's defined offenses. 42 U.S.C. 16911(1) and (5)-(7). To encourage States to conform their sex-offender registries to certain minimum standards, SORNA requires States to adapt their registries to incorporate the standards set out in SORNA or risk losing federal funds. 42 U.S.C. 16912, 16925. SORNA specifies, among other things, the kinds of information that must be collected as part of registration (42 U.S.C. 16914) and the length of time offenders must remain registered (42 U.S.C. 16915).[1]

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[1] States may adopt sex-offender-registration requirements that exceed the minimum standards specified by SORNA. See Office of the Att'y Gen., U.S. Dep't of Justice, *The National Guidelines for Sex Offender Registration and Notification*, 73 Fed. Reg. 38,030, 38,032-38,035, 38,044, 38,046 (2008).

SORNA's registration requirements are divided into two categories. First, SORNA requires a sex offender to register following his conviction:

> The sex offender shall initially register—
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> (1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or
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> (2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

42 U.S.C. 16913(b). Second, SORNA requires a sex offender who has already registered to keep his registration current by updating it within three business days of any change in his "name, residence, employment, or student status." 42 U.S.C. 16913(c).

SORNA delegates to the Attorney General the authority to further specify registration requirements in certain situations:

> *Initial registration of sex offenders unable to comply with subsection (b)*
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> The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b).

42 U.S.C. 16913(d).

On February 28, 2007, the Attorney General issued an interim rule, effective on that date, specifying that

"[t]he requirements of [SORNA] apply to all sex offenders, including sex offenders convicted of the offense for which registration is required prior to the enactment of that Act." 28 C.F.R. 72.3. In the preamble to the rule, the Attorney General explained that "[c]onsidered facially, SORNA requires all sex offenders who were convicted of sex offenses in its registration categories to register in relevant jurisdictions, with no exception for sex offenders whose convictions predate the enactment of SORNA." 72 Fed. Reg. at 8896. The interim rule, however, served the purpose of "confirming SORNA's applicability" to "sex offenders with predicate convictions predating SORNA." *Ibid.*

In order to enforce SORNA's registration requirements, Congress also created a federal criminal offense penalizing non-registration. Under 18 U.S.C. 2250, a sex offender required to register under SORNA, who, *inter alia*, "travels in interstate or foreign commerce" and "knowingly fails to register or update a registration" as required under SORNA may be punished by up to ten years of imprisonment. 18 U.S.C. 2250(a). The statute provides an affirmative defense if "uncontrollable circumstances" prevent an individual from complying with the registration requirements. 18 U.S.C. 2250(b).

After confirming that SORNA's registration requirements apply to individuals who were sex offenders by virtue of pre-SORNA convictions, 28 C.F.R. 72.3, the text of the Attorney General's February 2007 rule included an example that addressed the prospect of criminal liability under Section 2250 for sex offenders who had moved from one State to another and, after SORNA was enacted, were found to be unregistered in the new State:

> A sex offender is convicted by a state jurisdiction in 1997 for molesting a child and is released following imprisonment in 2000. The sex offender initially registers as required, but disappears after a couple of years and does not register in any other jurisdiction. Following the enactment of [SORNA], the sex offender is found to be living in another state and is arrested there. The sex offender has violated the requirement under [SORNA] to register in each state in which he resides, and could be held criminally liable under 18 U.S.C. 2250 for the violation because he traveled in interstate commerce.

28 C.F.R. 72.3 (Example 2).

2. In 2004, petitioner was convicted of first degree sexual abuse in Alabama. When he was released from custody, petitioner registered in Alabama as a sex offender. Near the end of 2004, he moved to Indiana.[2] On July 19, 2007, he was discovered living in Fort Wayne, Indiana. As of that date, petitioner had not registered as a sex offender in Indiana. Pet. App. 15a.

In August 2007, a federal grand jury charged petitioner with violating 18 U.S.C. 2250(a). Pet. App. 14a. Petitioner moved to dismiss the indictment, asserting that "his prosecution and any conviction would violate the Ex Post Facto Clause of the United States Constitution" because his interstate travel had occurred before

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[2] The district court described petitioner's move from Alabama to Indiana as occurring "in 2004 or 2005." Pet. App. 15a. In his statement accepting responsibility for his offense conduct, petitioner was more specific about the timing: "I registered as a Sex Offender on July 6, 2004, in Alabama. I then traveled to Indiana between Christmas 2004 and New Year's [D]ay 2005 and did not register as a Sex Offender." Pre-sentence Investigation Report ¶ 24 (PSR).

SORNA's enactment. Mot. to Dismiss 1; Pet. App. 15a. The district court rejected petitioner's constitutional claim either because SORNA is a "civil, regulatory statute" that "does not implicate the ex post facto clause," or, in the alternative, because petitioner was "not being held accountable for pre-SORNA conduct," but rather for "remain[ing] unregistered in the state of Indiana after the passage of SORNA." *Id.* at 19a. The court thus denied his motion to dismiss the indictment. *Ibid.* Petitioner then entered a conditional guilty plea, reserving the right to appeal the denial of his motion to dismiss. *Id.* at 2a; Plea Agreement ¶ 7(g). The court sentenced him to 30 months of imprisonment, to be followed by three years of supervised release.[3] Amended Judgment 2-3.

3. a. On appeal, petitioner presented a single issue: "Is the conviction of the Defendant in violation of the Ex Post Facto Clause of the Constitution?" Pet. C.A. Br. 5. After oral argument, the Seventh Circuit consolidated petitioner's appeal with that of another defendant-appellant, Marcus Dixon, whose underlying conduct was unrelated to petitioner's and whose district court proceedings were conducted before a different judge. See Pet. App. 15a; 08-1438 Docket entry No. 31 (7th Cir. Dec. 22, 2008); 08-2008 Docket entry No. 17 (7th Cir. Dec. 22, 2008). Like petitioner, Dixon argued that his conviction for violating SORNA violated the Ex Post Facto Clause. Pet. App. 2a, 8a-12a. But Dixon also argued that, as a matter of statutory construction, "he did not violate [SORNA] because he traveled in interstate

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[3] The 30-month term of imprisonment was at the bottom of the advisory Guidelines range, as computed in the PSR on the basis of a total offense level of 12 and a criminal history category of VI. See PSR ¶ 100.

commerce before [SORNA] was passed." *Id.* at 4a; cf. *id.* at 12a (stating that "the only ground of [petitioner's] appeal [was] that his conviction violated the ex post facto clause").

b. The court of appeals rejected petitioner's ex-post-facto claim and affirmed his conviction. Pet. App. 12a-13a. The court explained that the Ex Post Facto Clause is not violated "as long as at least one of the acts" that is "required for punishment" occurs after "the criminal statute punishing the acts takes effect." *Id.* at 8a-9a. The court found that that standard was satisfied in petitioner's case because petitioner had no obligation to register under SORNA until February 28, 2007—the date on which the Attorney General's rule was issued and seven months after SORNA had taken effect.[4] *Id.* at

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[4] The courts of appeals are divided on whether SORNA's registration requirements apply by the statute's own terms to persons with sex-offense convictions that preceded SORNA's enactment or whether Congress intended for the Attorney General to decide that question. Compare *United States* v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008) (former view), cert. denied, 129 S. Ct. 2383 (2009), and *United States* v. *May*, 535 F.3d 912, 916-919 (8th Cir. 2008) (same), cert. denied, 129 S. Ct. 2431 (2009), with *United States* v. *Cain*, 583 F.3d 408, 414-419 (6th Cir. 2009), pet. for reh'g pending, No. 07-4535 (filed Dec. 7, 2009) (latter view), *United States* v. *Hatcher*, 560 F.3d 222, 226-229 (4th Cir. 2009) (same), Pet. App. 3a, 9a-10a (7th Cir.) (same), and *United States* v. *Madera*, 528 F.3d 852, 857-859 (11th Cir. 2008) (same). This Court has denied two petitions for writs of certiorari seeking review of the question whether SORNA's registration requirements became applicable to such persons in July 2006 or February 2007, see *May* v. *United States*, 129 S. Ct. 2431 (2009) (No. 08-7997); *Hinckley* v. *United States*, 129 S. Ct. 2383 (2009) (No. 08-8696), and that question is not before the Court in this case. In any event, the question of when SORNA's registration requirements first became applicable to sex offenders whose convictions predated the Act is immaterial here because the court of appeals applied the standard that is more favorable to petitioner.

12a. It also concluded that he was allowed "a reasonable time after" the Attorney General's regulation to register, *id.* at 11a, but that petitioner "d[id] not and c[ould] not complain that he was not given enough time to register in Indiana in order to avoid violating [SORNA]." *Id.* at 12a. To the contrary, petitioner "admitt[ed] that he had still failed to [register] * * * almost five months after" his duty to register was made clear by the Attorney General's rule. *Ibid.* The court of appeals thus rejected petitioner's ex-post-facto claim because "his violation was not complete when [SORNA] became applicable to him." *Id.* at 13a.

c. In contrast, the court of appeals reversed Dixon's conviction for violating SORNA and remanded with instructions to enter a judgment of acquittal. Pet. App. 3a, 12a, 13a.

The court of appeals first rejected Dixon's argument that, as a matter of statutory construction, SORNA is inapplicable to a person whose interstate travel predated the statute's enactment. Pet. App. 4a-6a. The court concluded that SORNA does not "require[] that the conviction of the sex offense that triggers the registration requirement postdate" the statute. *Id.* at 4a. The court also stated that "[t]he evil at which [SORNA] is aimed is that convicted sex offenders registered in one state might move to another state, fail to register there, and thus leave the public unprotected," and it noted that this "concern is as acute in a case in which the offender moved before [SORNA] was passed as in one in which he moved afterward." *Ibid.* (citing *House Report* 23-24, 26). The court of appeals drew an analogy between SORNA and the federal law that prohibits convicted felons from possessing firearms that have traveled in interstate commerce, and it noted that, under that law,

there is no requirement that the firearm have moved in interstate commerce after the law was enacted. *Ibid.* (citing *Scarborough* v. *United States*, 431 U.S. 563 (1977)).

The court of appeals noted that the Tenth Circuit had reached a different conclusion, holding that, as a matter of statutory construction, SORNA "punishes only convicted sex offenders who travel in interstate commerce after [SORNA] was passed." Pet. App. 5a (citing *United States* v. *Husted*, 545 F.3d 1240 (2008)). Nevertheless, it expressly "disagree[d] with the Tenth Circuit's interpretation" and concluded that Section 2250(a)(2)(B) "is designed to establish a constitutional predicate for [SORNA's criminal provision] * * * rather than to create a temporal requirement." *Id.* at 6a.

Having rejected Dixon's claim about the timing of interstate travel, the court of appeals nevertheless determined that, consistent with the Ex Post Facto Clause and concerns for "fair notice," the statute should be construed as allowing a reasonable time for compliance after it became applicable. Pet. App. 8a-12a. As it had determined with respect to petitioner, the court concluded that SORNA became applicable to Dixon on February 28, 2007, the date on which the Attorney General promulgated his rule. *Id.* at 9a-10a. The court noted that the indictment charged Dixon with failing to register "from on or about February 28, 2007 to on or about April 5, 2007." *Id.* at 10a. The court viewed SORNA as "requir[ing] registration not on the day [SORNA] went into effect or a regulation by the Attorney General made [SORNA] applicable to a defendant, but within a reasonable time after that," *id.* at 10a-11a, and it held that the period between February 28, 2007, and April 5, 2007, was too short to permit a criminal prosecution under

Section 2250 of Dixon for failure to register, *id.* at 10a-12a.

SUMMARY OF ARGUMENT

SORNA's criminal prohibition for failure to register as a sex offender was validly applied to petitioner in light of his pre-SORNA conviction for a sex offense, his pre-SORNA interstate travel, and his post-SORNA failure to register. That application of the statute does not violate the Ex Post Facto Clause.

I. A. The interstate-travel element of Section 2250(a), read in its statutory context, is not limited to travel that occurs after SORNA. The statute's elements need to be satisfied in sequence, culminating in a post-SORNA failure to register. Thus, as relevant here, someone must first have a conviction for a sex offense (which can precede SORNA), must then travel in interstate commerce, and then (after SORNA becomes applicable) must knowingly fail to register as it requires. Nothing in the statute imposes an additional requirement that the travel precede SORNA's enactment.

The statute's structure supports that conclusion. If Section 2250(a)(2)(B) could not apply to pre-SORNA travel, it would give rise to an anomalous difference in treatment between the two classes of sex offenders that SORNA covers. Persons who were sex offenders by virtue of federal convictions would be covered without any post-SORNA conduct except the failure to register, whereas persons who have state or foreign convictions but fall within Congress's Commerce Clause jurisdiction would be covered only if they traveled post-SORNA. Congress could not have wished to create such an unjustifiable disparity.

B. Applying Section 2250(a)(2)(B) to pre-SORNA travel also furthers the statutory purpose. As the legislative history indicates, the Congress that enacted SORNA believed that "[t]he most significant enforcement issue in the sex offender program" was "missing" sex offenders who had "not complied with sex offender registration requirements," "typically" because they had "move[d] from one State to another." H.R. Rep. No. 218, 109th Cong., 1st Sess. Pt. 1, at 26 (2005) (*House Report*). Petitioner is a paradigmatic example of that problem, and the purpose of re-registering such missing sex offenders is better served by making Section 2250 immediately applicable to them in their new States of residence than by waiting for them to travel in interstate commerce and fail to register yet again.

C. No canons or presumptions of statutory construction require or justify limiting Section 2250(a)(2)(B) to post-SORNA travel. Although petitioner contends that the statute would violate the Ex Post Facto Clause if construed as applying to pre-SORNA travel, that constitutional claim fails on the merits, and does not raise a serious issue to be avoided, because the course of conduct proscribed by Section 2250(a) cannot be completed until after SORNA becomes applicable. Nor does the government's reading raise any concerns under the Commerce Clause (as one of petitioner's amici suggests). The extent of Congress's powers under the Commerce Clause depends on the connection between Congress's regulation and interstate commerce, not on the timing of an event relative to the statute's enactment. Indeed, the government's reading of the statute, by requiring interstate travel to come only after a sex-offense conviction, ensures a closer connection between the regulation and

Congress's Commerce Clause powers than would petitioner's post-SORNA-travel limitation.

The rule of lenity does not apply in this case because no "grievous ambiguity" exists once the Court has construed Section 2250 in light of its text, context, structure, and purpose. *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998).

II. Reliance on pre-SORNA travel to establish the interstate-travel element of Section 2250(a) does not violate the Ex Post Facto Clause, because the remaining element—the knowing failure to register as required by SORNA—occurs only after SORNA has become applicable.

A. While SORNA's requirement to register as a sex offender is a regulatory, nonpunitive measure, there is no dispute that criminal punishment under Section 2250 implicates the Ex Post Facto Clause. Retroactive effects under the Ex Post Facto Clause, however, exist only when a statute imposes new punishments on "crimes that have already been committed," or acts that were completed, "consummated," or done before the statute became effective. See, *e.g.*, *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) (quoting *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937)). A prosecution for a course of conduct that straddles the effective date of a statute is permissible as long as at least one act constituting the offense took place after the statute took effect. Thus, this Court has held that a statute does not violate the Ex Post Facto Clause when it penalizes a party's post-enactment failure to take action to terminate a condition that resulted from pre-enactment conduct that was lawful when engaged in. See *Samuels* v. *McCurdy*, 267 U.S. 188 (1925); *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915).

B. Petitioner's relevant course of conduct was not in fact completed, consummated, or done before SORNA became applicable to him. Section 2250 does not punish a violation of the registration requirement provided by an earlier statute, but rather a new violation of the registration requirement imposed by SORNA. Although Congress cannot criminalize a previously lawful course of conduct so that a defendant is unable to avoid liability by altering his conduct, no such concerns exist in petitioner's case. The court of appeals properly construed the statute "as allowing * * * a reasonable time" to come into compliance with its new requirements, *Tranbarger*, 238 U.S. at 74, and the statute's affirmative defense for "uncontrollable conditions" that prevent compliance (18 U.S.C. 2250(b)(1)) allows for the requisite minimum grace period. In this case, petitioner had at least five months after SORNA became applicable to him to satisfy its registration requirements, which was an ample period of time—especially in the context of a statutory framework that typically allows a sex offender only three business days after a qualifying event occurs to register or update a registration.

ARGUMENT

I. THE ELEMENTS OF SECTION 2250(a) CAN BE SATISFIED BY A PRE-SORNA CONVICTION FOR A SEX OFFENSE, FOLLOWED BY PRE-SORNA TRAVEL IN INTERSTATE COMMERCE AND A POST-SORNA FAILURE TO REGISTER

Petitioner contends (Br. 16-35) that, as a matter of statutory construction, the criminal provision enforcing SORNA's registration requirements, 18 U.S.C. 2250(a), does not apply to a person whose interstate travel preceded SORNA's enactment. That argument is mistaken.

In light of the statutory language, context, and structure, Section 2250(a) requires its three elements to be satisfied in sequence: first, an individual must be convicted of an offense that requires registration; second, he must travel in interstate commerce; and third, he must fail to comply with registration obligations under SORNA. Nothing in the statute imposes an additional requirement that the interstate travel occur after SORNA's enactment. The government's reading is consistent with the text of the statute, is necessary to avoid creating an unjustified asymmetry between the two jurisdictional provisions located in Section 2250(a)(2), advances the statutory purpose of locating missing sex offenders, and minimizes petitioner's concerns about broader readings of the jurisdictional link to interstate commerce.

A. Section 2250(a)(2)(B)'s Context And Structure Clarify Its Applicability To Pre-SORNA Travel

1. Petitioner's textual argument rests almost entirely on the observation (Br. 17-23) that all three of the relevant elements of Section 2250(a) include verbs in the present tense: (1) "*is* required to register," (2) "*travels* in interstate * * * commerce," and (3) "knowingly *fails* to register." 18 U.S.C. 2250(a)(1), (2)(B) and (3) (emphases added). But those present-tense verbs are, in fact, not very revealing, because they must be evaluated in light of the context and structure of Section 2250 and the other provisions of SORNA with which it interacts. See *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall

statutory scheme.").[5] Similarly, petitioner invokes (Br. 20) the Dictionary Act in support of the proposition that "words used in the present tense include the future as well as the present." 1 U.S.C. 1. But that provision expressly authorizes exceptions when "the context indicates otherwise." *Ibid.*; see also *Rowland* v. *California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-201 (1993) (explaining that "syllogistic force" is not required for context to "indicate[] otherwise" for purposes of the Dictionary Act).

2. In context, the interstate-travel element of Section 2250(a) should not be limited to acts that occur after SORNA. Instead, Section 2250(a) requires only that the knowing failure to register as required by SORNA must occur after enactment.

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[5] Petitioner relies (Br. 17-18) upon cases in which this Court interpreted the present tense of a verb to refer to an act or status at a particular point in time. But none of the statutes at issue in those cases is sufficiently analogous to Section 2250(a) to support petitioner's construction of "travels." The cases he cites concluded that an act or status described in the present tense must be judged as of the same time as another act mentioned in the statute, but petitioner does not suggest that, under Section 2250(a), travel must be co-incident with some other element mentioned in the statute. See *Dole Food Co.* v. *Patrickson*, 538 U.S. 468 (2003) (reference in a removal statute to an entity that "is owned by a foreign state" is to be judged as of the time suit was filed); *Ingalls Shipbuilding, Inc.* v. *Director, Office of Workers' Comp. Programs*, 519 U.S. 248 (1997) (reference to a "person entitled to compensation * * * [who] enters into a settlement with a third person" requires the entitlement to compensation to exist at the time of settlement); *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49 (1987) (authorization of a citizen suit against any person "alleged to be in violation of" conditions of a federal or state pollution discharge permit requires that the violation be ongoing at the time of suit).

> As the Fourth Circuit has explained:
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> [The statute] requires * * * a specific sequence. To satisfy the commerce component of § 2250(a), a sex offender must have been convicted of a qualifying sex offense and, after conviction, traveled to another State and failed to register or maintain his registration. There must be a conviction that gives rise to the registration requirement, subsequent interstate travel, and a failure to register.

United States v. *Gould*, 568 F.3d 459, 471 (2009), petition for cert. pending, No. 09-6742 (filed Sept. 25, 2009). That sequence not only honors the structure of Section 2250(a), by treating Paragraphs (1), (2), and (3) as being triggered in the same order they are listed. It also comports with the substance of, and the logical relationship among, those three elements and SORNA's registration provisions.[6]

The first element refers to a person who "is required to register under [SORNA]." 18 U.S.C. 2250(a)(1). In order to be "required to register under" SORNA, a person must be a "sex offender," 42 U.S.C. 16913(a)-(c), which is in turn defined as "an individual who *was* convicted of a sex offense." 42 U.S.C. 16911(1) (emphasis added). Thus, the first element—that a person "is required to register under [SORNA]"—is a shorthand way

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[6] Petitioner agrees (Br. 24) that an offense under Section 2250(a) comprises three elements. His law professor amici, however, contend (at 23 & n.7) that Section 2250(a) contains two elements rather than three, because they say Paragraph (1) "is best read as the corresponding duty for" the failure to register under Paragraph (3). That contention is based on their conclusion (*ibid.*) that "the only possible location for the duty [to register] * * * is [Paragraph (1)]." But the statutory text contains a more logical location for the duty to register under SORNA—in 42 U.S.C. 16913.

of identifying those persons who have a conviction in the classes identified by SORNA (and remain within the applicable registration period under 42 U.S.C. 16915). Petitioner does not dispute that SORNA's registration requirement applies to a person who was convicted of such an offense before SORNA. See Pet. Br. 24.[7]

The second element, as relevant here, refers to a person who "travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country." 18 U.S.C. 2250(a)(2)(B). Thus, in combination, the first two elements apply to any person who "was convicted of a sex offense" and "travels" in interstate commerce. That defines the category of persons who are then in a position to satisfy the third element, which begins with the mens rea. That element is satisfied when a person "knowingly fails to register or update a registration as required by [SORNA]." 18 U.S.C. 2250(a)(3). Unlike the first element, which can be triggered by a pre-SORNA event (a conviction for a sex offense), the third element plainly requires conduct that occurs after SORNA applies: a failure to comply with its registration requirements.

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[7] Upon its effective date, SORNA itself imposed registration obligations on persons who had previously been convicted of sex offenses. See 42 U.S.C. 16911(1), 16913(a) and (d). The statute's general applicability to pre-SORNA convictions is acknowledged by 42 U.S.C. 16913(d), which delegates to the Attorney General "the authority to *specify* the applicability of the requirements of this subchapter to sex offenders convicted before [the date of SORNA's enactment]." *Ibid.* (emphasis added); see, *e.g.*, *United States* v. *Hinckley*, 550 F.3d 926, 929-935 (10th Cir. 2008), cert. denied, 129 S. Ct. 2383 (2009). As explained above (pp. 6-7, *supra*), on February 28, 2007, the Attorney General promulgated a regulation confirming that SORNA applied to those who were sex offenders by virtue of criminal convictions that preceded SORNA's enactment. 28 C.F.R. 72.3.

Thus, in context, the definition of the offense contemplates a sequence: the offender is convicted of a sex offense, then he travels in interstate commerce, and then he fails to register or update a registration as required by SORNA. He does not commit the offense if his interstate travel precedes his conviction for a sex offense; nor does he commit the offense if his interstate travel occurs only *after* his knowing failure to register. But nothing in the statute demands that the travel come after SORNA's applicability.[8]

3. The government's sequential reading of Section 2250(a) is reinforced by the statute's structure. The reading not only conforms to the ordering of the elements within Section 2250, but also ensures that the jurisdictional reach of Section 2250(a)(2) has a comparable breadth as applied to both federal and state sex offenders.

Section 2250(a)(2) reaches two categories of sex offenders: those whose underlying sex offenses were criminalized by virtue of federal or tribal authority (*i.e.*, those with "a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States," 18 U.S.C. 2250(a)(2)(A)), and all other sex offenders whose actions directly implicated Congress's Commerce Clause au-

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[8] In addition, Congress has shown, in the context of a registration statute, that it knows how to invoke its jurisdiction to regulate movement in interstate commerce so as not to reach pre-enactment events. See, *e.g.*, 15 U.S.C. 1173(a)(3) (requiring manufacturers and dealers in gambling devices to register with the Attorney General before buying or receiving a gambling device "knowing that it has been transported in interstate or foreign commerce *after the effective date of the Gambling Devices Act of 1962*") (emphasis added).

thority as a result of "travel[ing] in interstate or foreign commerce, or enter[ing] or leav[ing], or resid[ing] in, Indian country," 18 U.S.C. 2250(a)(2)(B). Thus, Section 2250(a) relies on two alternate sources of power to achieve Congress's aim of broadly registering sex offenders. Cf. 42 U.S.C. 16901 (stating that the purpose of SORNA was to "establish[] a comprehensive national system for the registration of [sex] offenders"). There is every reason to conclude that Congress intended an equally broad sweep to those jurisdictional provisions. But petitioner's interpretation would fail to produce that result. Under that interpretation, the statute would cover *all* sex offenders previously convicted under federal-government (or tribal) law, but not sex offenders previously convicted under state or foreign law unless they traveled in interstate or foreign commerce after SORNA's enactment. The statute should be construed to avoid that anomaly.

B. Applying Section 2250(a)(2)(B) To Pre-SORNA Travel Better Effectuates The Statutory Purpose

The government's reading of Section 2250 not only follows from the statute's context and structure but also furthers a key purpose of SORNA: to locate sex offenders who had evaded their registration obligations by traveling from State to State.

1. As discussed above (see pp. 2-4, *supra*), Congress enacted multiple laws in the dozen years before SORNA that were intended to provide for sex-offender registration and community notification. Despite those many laws, by 2006, an estimated 100,000 out of 500,000 sex offenders in the United States remained "unregistered and their locations unknown to the public and law enforcement." 152 Cong. Rec. H5722 (daily ed. July 25,

2006) (statement of Rep. Sensenbrenner). The House Judiciary Committee stressed the problem of "missing" sex offenders and expressly connected that problem with interstate travel:

> The most significant enforcement issue in the sex offender program is that over 100,000 sex offenders, or nearly one-fifth in the Nation, are "missing," meaning that they have not complied with sex offender registration requirements. *This typically occurs when the sex offender moves from one State to another.* When a sex offender fails to register in a State in which he or she resides, there is no effective system by which the States can notify each other about the change in a sex offender[']s status. H.R. 3132 will address this problem in several ways.

House Report 26 (emphasis added).

2. Petitioner does not dispute SORNA's purpose. See Br. 29 ("in crafting the new sex offender registration system, Congress was particularly concerned that sex offenders were able to evade then-existing registration requirements by moving between jurisdictions"). Nevertheless, he claims (Br. 30) that "[e]ffectuating this purpose dictated an emphasis on *post*-SORNA travel." But exactly the opposite is true. Petitioner—with his pre-SORNA travel—is a paradigmatic example of the problem of "missing" sex offenders who had registered in one State and failed to keep their registration current after moving to another State. The purpose of re-registering such missing sex offenders is surely better served by making Section 2250 applicable to them in their new States of residence immediately than by waiting for

them to travel in interstate commerce and fail to register yet again.[9]

3. Petitioner suggests that Congress had "no need" to provide new federal criminal liability for the population of missing sex offenders because they would "be subject to state prosecution pursuant to the new statutes, carrying enhanced penalties, that SORNA directs the States to enact." Br. 31; see 42 U.S.C. 16913(e). But that suggestion founders for multiple reasons. SORNA gives States a period of years to enact such new statutes, see 42 U.S.C. 16924, and that delay would occur during the very period (soon after SORNA's enactment) in which the ability to reach pre-SORNA travel would have the greatest impact. In addition, some States might choose to forgo federal funding rather than comply with Congress's request to create an enhanced penalty for failure to satisfy registration requirements. See 42 U.S.C. 16925. Moreover, if Congress had believed that *state* criminal penalties would be sufficient to en-

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[9] When the Judiciary Committee wrote its report, the relevant section of the bill it was considering would not have reached pre-enactment interstate travel; instead, its criminal penalty for failure to register would have applied to a person who "receives a notice from an official that such person is required to register under [SORNA] and— * * * (2) thereafter travels in interstate * * * commerce * * *; and knowingly fails to register as required." *House Report* 9. It would also have imposed higher minimum and maximum sentences. *Ibid.* (a term of imprisonment "not less than 5 years nor more than 20 years"). Although the legislative history does not explain the reasons for the later revisions to Section 2250, the enacted text omitted the language that would have required a sex offender to receive post-SORNA notification of his registration requirement and "thereafter" travel in interstate commerce. It is reasonable to infer that Congress concluded it could more effectively reach missing sex offenders by making the statute applicable to pre-SORNA travel.

sure adequate enforcement of SORNA's registration requirements, it would have relied upon those penalties for sex offenders who failed to register after their *post*-SORNA interstate travel. Congress's enactment of Section 2250(a)(2)(B) demonstrates that it believed that federal criminal punishment would play an important role in supplementing state enforcement, and that conclusion does not vary with the time of travel.

Petitioner further claims (Br. 32) that "[a]n unregistered sex offender who has previously traveled in interstate commerce is no different from an unregistered sex offender who has not." But that is simply not true. The missing sex offender who previously traveled in interstate commerce has already engaged in the very conduct that motivated congressional action. See *House Report* 26 (noting that the "typical[]" case of a missing sex offender "occurs when the sex offender moves from one State to another"). By contrast, the unregistered sex offender who never traveled had not evaded detection by using the channels of interstate commerce.[10]

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[10] Petitioner attempts (Br. 33-34) to rebut the court of appeals' reliance on *Scarborough* v. *United States*, 431 U.S. 563 (1977), by claiming that—unlike the predecessor to 18 U.S.C. 922(g) involved in that case, which generally precluded convicted felons and others from possessing firearms "in commerce or affecting commerce"—Section 2250(a)(2)(B) reflects a decision by Congress to cabin the use of its Commerce Clause powers. See 18 U.S.C. 2250(a)(2)(B) (relying on interstate travel rather than actions "in or affecting commerce"). But the interstate-travel element in Section 2250 does not show that Congress was willing to go only halfway. To the contrary, in the context of sex-offender registration, Congress's power to regulate the movement of persons in interstate commerce is more tractable than its power to regulate actions "affecting commerce," and interstate travel is more obviously tied to the underlying concern about missing sex offenders. Moreover, Congress was surely aware that the inclusion of a case-

C. No Canon Of Statutory Construction Or Other Presumption Requires Petitioner's Reading Of Section 2250

1. No constitutional doubts would be avoided by adopting petitioner's reading

Petitioner argues (Br. 44-48) that the canon of constitutional avoidance favors his statutory interpretation. That canon applies only when a reading of a statute raises "serious constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005). In this case, however, applying Section 2250(a)(2)(B) to pre-SORNA travel does not raise any such doubts.

a. Petitioner contends (Br. 44-48) that Section 2250 would violate the Ex Post Facto Clause if "travels" were construed as including an act that occurred before SORNA's applicability. Yet, as discussed below on the merits (see pp. 30-41, *infra*), petitioner's ex-post-facto argument raises no serious constitutional question and thus provides no basis for adopting his reading of the statute.

b. The amicus brief of the National Association of Criminal Defense Lawyers (NACDL) (at 14-18) contends that application of Section 2250 to interstate travel that preceded SORNA would "raise[] serious concerns that the Act exceeds Congress's authority under the Commerce Clause." Petitioner himself does not invoke that constitutional concern, and it is easy to see why not: the timing of interstate travel relative to the date of the statute has nothing to do with the extent of Congress's Commerce Clause powers. Any Commerce

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specific jurisdictional element of interstate travel would most readily answer Commerce Clause objections. See, *e.g.*, *United States* v. *Lopez*, 514 U.S. 549, 561 (1995); *Gonzales* v. *Raich*, 545 U.S. 1, 33-34 (2005) (Scalia, J., concurring in the judgment).

Clause challenge to SORNA would presumably be based on a claim that the sex offender's failure to register and his interstate travel were insufficiently connected—not that one of these elements occurred before, and the other occurred after, the statute's enactment. Requiring both the interstate travel and the failure to register to occur after SORNA's enactment would not change the logical connection between the two elements. Nor would it necessarily alter, in the way the amicus brief suggests, the chronological connection, given that the length of the gap between the interstate travel and the failure to register is unrelated to whether the travel occurred before or after SORNA. Thus, adopting petitioner's reading of Section 2250(a)(2)(B) could not avoid any constitutional concern based on imposing criminal liability for a sex offender's failure to register "years or decades" after he traveled in interstate commerce. NACDL Amicus Br. 17.

Indeed, the government's reading of Section 2250 creates a closer nexus than petitioner's does between interstate travel and a failure to register. By temporally sequencing the sex-offense conviction, the interstate travel, and the failure to register, the government's reading avoids the concern (Pet. Br. 35) that the statute could be applied to a defendant who "crossed a state line on the way home from the hospital as an infant and * * * committed a sex offense forty years later." Because petitioner's own reading would appear to permit that result so long as the infant crossed state lines after SORNA's enactment, any concerns about "absurd result[s]" (*ibid.*) on that score counsel in favor of the government's construction.

2. No presumption against retroactivity applies

Petitioner invokes (Br. 26-28) the general presumption against retroactivity in an attempt to influence the interpretation of the interstate-travel element of Section 2250(a). But no such presumption would give petitioner further aid in that regard than the Ex Post Facto Clause itself, which "flatly prohibits retroactive application of penal legislation." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 266 (1994). Although this Court has noted that "deciding when a statute operates 'retroactively' is not always a simple or mechanical task," *id.* at 268, it has never suggested that the definition of retroactive effect is broader in the context of construing statutes than of applying the Ex Post Facto Clause. Moreover, this Court has explained that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269 (citation omitted); see also *id.* at 270 n.24 ("[A] statute is not made retroactive merely because it draws upon antecedent facts for its operation.") (internal quotation marks omitted).

As explained below (see pp. 30-41, *infra*), under this Court's Ex Post Facto Clause cases, construing Section 2250(a)(2)(B) as applying to pre-SORNA travel would not render it "retroactive," leaving petitioner nothing to gain from a presumption against retroactivity.[11]

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[11] Petitioner suggests (Br. 28) that a "clear statement" of congressional intent is needed for a criminal statute to apply retroactively. It is difficult to see how such a clear-statement rule could provide any benefit to a criminal defendant beyond that given by the Ex Post Facto Clause (which forbids retroactive penal laws) and the rule of lenity (which would require a grievous ambiguity to be resolved in a criminal defendant's favor).

3. The rule of lenity does not apply

Petitioner's rule of lenity argument (Br. 24-26) also fails. As he correctly notes, the rule applies only when, "'after seizing everything from which aid can be derived,' the Court can make 'no more than a guess as to what Congress intended.'" Br. 25 (quoting *United States* v. *Wells*, 519 U.S. 482, 499 (1997)). Such a situation exists only when there is a "grievous ambiguity," *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998), such that "the equipoise of competing reasons cannot otherwise be resolved," *Johnson* v. *United States*, 529 U.S. 694, 713 n.13 (2000).

Here, once the Court has seized aid from the context, structure, and purpose discussed above, there is no such grievous ambiguity or equipoise. See, *e.g.*, *United States* v. *Hayes*, 129 S. Ct. 1079, 1089 (2009) (rejecting application of the rule of lenity after considering "text, context, purpose, and * * * drafting history"); *Caron* v. *United States*, 524 U.S. 308, 316 (1998) (rejecting application of the rule of lenity where the defendant's reading "is an implausible reading of the congressional purpose"); *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (rule of lenity applies only after Court has reviewed "the language and structure, legislative history, and motivating policies of the statute") (internal quotation marks omitted).

The rule of lenity has been invoked when the underlying conduct, absent the defendant's construction, is thought to be innocent or innocuous, thus triggering fair warning concerns. See, *e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing the situation in which "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign"); see also *Hayes*, 129 S. Ct. at 1093 (Roberts, C.J.,

dissenting). But no such situation is present here. To the contrary, the wrongfulness of the conduct punished by Section 2250(a)(3)—a sex offender's knowing post-SORNA failure to register as required by SORNA—is incontestable. The timing of interstate movement has no bearing on the culpability of that conduct. Indeed, in the case of persons with prior sex-offense convictions under federal, District of Columbia, tribal, or territorial law, such a failure to register is the sole *actus reus* under Section 2250.

Accordingly, the rule of lenity does not counsel in favor of petitioner's reading.

II. RELIANCE ON PRE-SORNA TRAVEL TO SATISFY THE INTERSTATE-TRAVEL ELEMENT OF SECTION 2250(a) DOES NOT VIOLATE THE EX POST FACTO CLAUSE BECAUSE THE KNOWING FAILURE TO REGISTER OCCURS ONLY AFTER SORNA BECOMES APPLICABLE

Petitioner argues (Br. 35-48) that, if Section 2250 is construed as applying to an individual whose interstate travel preceded SORNA, then the provision violates the United States Constitution's prohibition on Congress's "pass[ing]" any "ex post facto Law." Art. I, § 9, Cl. 3. Petitioner's claim must fail because the course of conduct that Section 2250(a) criminalizes—the knowing failure to register or update a registration as required under SORNA by a person who was convicted of a sex offense and travels in interstate commerce—could not be completed until after SORNA had been enacted. Accordingly, the provision does not impermissibly penalize pre-SORNA conduct.

A. A Law Is Retrospective Under The Ex Post Facto Clause Only If It Applies To Conduct That Was Completed Before The Law's Enactment

This Court has long held that the Ex Post Facto Clause applies only to "a criminal or penal law," *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), and not to nonpunitive, regulatory provisions. See, *e.g.*, *Bankers Trust Co.* v. *Blodgett*, 260 U.S. 647, 652 (1923). SORNA's underlying requirement to register in 42 U.S.C. 16913 is a nonpunitive, regulatory provision, see generally *Smith* v. *Doe*, *supra*, but there is no dispute that the criminal offense defined by Section 2250 implicates the Ex Post Facto Clause.[12]

"The heart of the Ex Post Facto Clause * * * bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed[.]'" *Johnson*, 529 U.S. at 699 (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.)) (emphasis omitted). Thus,

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[12] The court of appeals did not, as petitioner's law professor amici suggest (at 29), decide that the criminal prohibition in Section 2250 "was not intended to be punitive." Instead, the court correctly explained that "the registration requirement itself * * * is regulatory rather than punitive." Pet. App. 8a. The court's distinction between the registration requirement and the criminal enforcement provision follows directly from this Court's decision in *Smith*—which held that Alaska's sex-offender-registration law was not punitive, even though the registration "scheme [was] enforced by criminal penalties," because "[i]nvoking the criminal process in aid of a statutory regime does not render the statutory scheme itself punitive" for purposes of ex-post-facto analysis. 538 U.S. at 96; see also *id.* at 101-102 (recognizing that "[a] sex offender who fails to comply with the reporting requirement may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the * * * original offense" that made the registration requirements applicable to him).

in order to prevail on an ex-post-facto claim, a defendant "must show both [1] that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and [2] that it raises the penalty from whatever the law provided when he acted." *Ibid.*[13] In this case, although Section 2250 defined a new criminal offense—which carried a greater potential punishment than the preexisting federal offense for a sex offender's failure to register under the Wetterling Act, see 42 U.S.C. 14072(i))—petitioner is still obliged to establish that Section 2250 "operates retroactively" in the sense that it applies to conduct that was *"completed* before its enactment." *Johnson*, 529 U.S. at 699 (emphasis added).

It is not sufficient for a defendant to show that some portion of his conduct occurred before enactment of a new criminal punishment. When characterizing the retroactivity inquiry under the Ex Post Facto Clause, this Court has repeatedly spoken of the imposition of new punishments on "crimes that have already been committed," or acts that were "completed," or "consummated," or "done" before the statute became effective. See, *e.g.*, *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 505 (1995) ("a legislature may not stiffen the 'standard of punishment' applicable to crimes that have already been

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[13] Petitioner quotes this Court's similar statement in *Weaver* that an ex-post-facto claim requires proof that a criminal or penal law is "retrospective" and that it "disadvantage[s] the offender affected by it." Br. 35-36 (quoting *Weaver*, 450 U.S. at 29). Although the Court has since distanced itself from an "ambiguous" query into the existence of a "disadvantage," *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 506 n.3 (1995), that portion of the two-prong test is not relevant to this case, because petitioner cannot establish that Section 2250 operates retrospectively.

committed") (quoting *Lindsey* v. *Washington*, 301 U.S. 397, 401 (1937); *ibid.* ("[T]he Constitution 'forbids the application of any new punitive measure to a crime already consummated.'") (quoting *Lindsey*, 301 U.S. at 401); *Collins* v. *Youngblood*, 497 U.S. 37, 49 (1990) ("A law that abolishes an affirmative defense of justification or excuse contravenes [the Ex Post Facto Clause applicable to States] because it expands the scope of a criminal prohibition after the act is done."); *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) ("A law is retrospective if it 'changes the legal consequences of acts completed before its effective date.'") (quoting *Weaver*, 450 U.S. at 31).

Thus, a prosecution for a course of conduct that straddles the effective date of a statute does not violate the Ex Post Facto Clause "as long as at least one of the acts [constituting the offense] took place" after the statute took effect.[14] Pet. App. 9a. As the cases cited by the

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[14] Petitioner does not agree with the contention of his law professor amici (at 11-14) that the Ex Post Facto Clause is violated unless every single element of a crime is proved at least in part by post-enactment conduct. See Pet. Br. 45 n.17 (characterizing a recidivism statute as constitutional "because *one element* of the offense was commission of a crime after the statute's enactment") (emphasis added). Indeed, the law professors concede that an element of an offense can be based on pre-enactment conduct when that element is a conviction that triggers a further duty. Amici Br. 13 n.4 (discussing a conviction under 18 U.S.C. 922(g)(9) for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence). They offer no coherent explanation for why other forms of pre-enactment conduct cannot be made elements, so long as at least one essential conduct element takes place post-enactment. Here, a pre-SORNA conviction can furnish a duty to register, and pre-SORNA travel in interstate commerce makes that duty enforceable in a criminal prosecution under SORNA based on post-SORNA conduct (*i.e.*, a knowing failure to register or update a registration). There is no reason for deeming that to be an ex-post-

court of appeals show, that rationale has correctly justified, for example, the prosecution of those who "conducted an enterprise through a pattern of racketeering activity having its inception" before 18 U.S.C. 1962(c) took effect, as long as the government "established that an act of racketeering occurred *after* the section's effective date." *United States* v. *Brown*, 555 F.2d 407, 416-417 (5th Cir. 1977), cert. denied, 435 U.S. 904 (1978); accord *United States* v. *Campanale*, 518 F.2d 352, 364-365 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1976).[15]

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facto violation when a Section 922(g)(9) prosecution that relies on a pre-enactment conviction is not. See *United States* v. *Mitchell*, 209 F.3d 319, 321-323 (4th Cir.) (upholding such a conviction under Section 922(g)(9)), cert. denied, 531 U.S. 849 (2000); Law Profs. Amici Br. 13 n.4 (citing *Mitchell* with approval).

[15] Petitioner's amici suggest (Law Profs. Amici Br. 13-14; NACDL Amicus Br. 9-11) that this Court should decide whether a violation of Section 2250(a) is a "continuing offense," in the sense that, once a sex offender has failed to register, he continues to violate the statute until he has come into compliance with its registration requirements. Whether Section 2250 does establish a continuing offense is irrelevant to the constitutional question. If it does, its consistency with the Ex Post Facto Clause would follow from cases like *Brown*, *supra*, and *Campanale*, *supra*. In arguing that Section 2250 does not create a continuing offense, amici rely principally on this Court's decision in *Toussie* v. *United States*, 397 U.S. 112 (1970), which observed that "[t]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime." *Id.* at 122. But much of *Toussie*'s reasoning was specific to the kind of registration requirement at issue there—a requirement to register for a military draft. See *id.* at 116, 122 (recognizing that the draft statute "might be construed [as a continuing offense] as the Government urges," but concluding otherwise, "in light of the history of the draft laws," which showed that "draft registrations clearly were viewed as instantaneous events"). Here, in contrast, no history indicates that a failure to register as a sex offender is an "instantaneous event[]." Instead, Congress's purpose of combating the problem of unregistered sex offenders in the community, who evade

Outside the conspiracy context, this Court has similarly rejected arguments that the Ex Post Facto Clause prevents a party's lawful pre-enactment conduct from being deemed to create a condition that a party must, upon the effectiveness of the new law, take affirmative action to terminate. For example, in *Chicago & Alton Railroad* v. *Tranbarger*, 238 U.S. 67 (1915), the Court sustained the constitutionality of a 1907 Missouri statute that required a railroad owner or operator "constructing any railroad in th[e] State, within three months after the completion of the same * * *, to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad." *Id.* at 71 (quoting 1907 Mo. Laws 170). The petitioner completed construction of its roadbed on "a solid embankment [*i.e.*, one without openings] at least as early as the year 1895" and claimed that the 1907 statute could not penalize it for failing to include such "openings" within three months of its 1895 construction. *Id.* at 73. The Court held that there was no ex-post-facto violation, explaining that the monetary penalty imposed by the statute was "not because of the manner in which [the petitioner] originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act of 1907, but because after that time it maintained the embankment in a manner prohibited by that act." *Ibid.* See also *Samuels* v. *McCurdy*, 267 U.S. 188 (1925) (rejecting ex-post-facto challenge to Georgia statute that prohibited the post-enactment possession of

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detection after interstate movement, suggests that such offenders remain a threat, and a target of the statute, so long as they remain unregistered. Of course, even if Section 2250 does not establish a continuing offense, it presents no ex-post-facto problem because, as discussed below, it requires post-SORNA conduct.

intoxicating liquor, even when the liquor in question had been lawfully acquired before the statute's enactment).[16]

For the same reasons, the charge against petitioner —that he knowingly failed to register after SORNA became applicable to him—poses no retroactivity problem under the Ex Post Facto Clause.

B. Petitioner's Failure To Register Was Not Completed Until After Section 2250 Applied To Him

Petitioner contends that Section 2250 criminalizes his pre-SORNA conduct, but the relevant course of conduct in this case was not in fact completed, consummated, or done before SORNA became applicable to petitioner. Although that course of conduct included interstate travel that preceded SORNA, it also included a "knowing[] fail[ure] to register or update a registration as required by [SORNA]," 18 U.S.C. 2250(a)(3), which did not occur until well after SORNA applied to him.

1. In his attempt to avoid the conclusion that he is being punished for a post-SORNA act, petitioner suggests first (Br. 37-40) that, if he could comply with SORNA's registration requirement by doing the same things that would satisfy the earlier Wetterling Act, then all of the conduct relevant to an offense under Sec-

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[16] The law professor amici propose (at 11, 21) a line between an act and an "omission." The Court declined the invitation to draw such a line in *Samuels*. The petitioner there attempted to distinguish *Tranbarger* by saying that Missouri's law requiring railroads to construct outlets had "penalized the refusal" to do "an affirmative act," while Georgia's law providing for the confiscation of liquor that had been lawfully acquired long ago would "penalize[] mere passivity" by punishing "a condition, to-wit, a physical possession that was lawful when acquired." *Samuels*, 267 U.S. at 189. This Court rejected the attempted distinction, declaring the question in *Samuels* to be "quite the same question as that presented in" *Tranbarger*. *Id.* at 193.

tion 2250 must have occurred before SORNA.[17] See also NACDL Amicus Br. 8. That is incorrect.

Section 2250(a) does not punish a violation of the registration requirement provided by the Wetterling Act, but rather a violation of the new registration requirement imposed by SORNA. That is clear under the terms of the statute—which apply to the "knowing[] fail[ure] to register or update a registration as required by [SORNA]." 18 U.S.C. 2250(a)(3). There is thus no basis for saying that petitioner was convicted for a course of conduct that was completed or consummated before SORNA became applicable to him.

As petitioner notes (Br. 37-38), most States have not yet created registries that conform to SORNA's heightened requirements, and it is true that defendants are not liable under Section 2250 for failing to comply with those heightened requirements "during the interval when States are not [yet] compliant with SORNA." Pet. Br. 36. But that does not undercut the reality that Section 2250 punishes post-enactment violations of a distinct law. Although SORNA enhanced the registration requirements that previously applied to sex offenders, it also generally gave States and other implementing jurisdictions three years to implement the new system, and it authorized the Attorney General to provide up to two one-year extensions of that deadline. 42 U.S.C. 16924(a) and (b). To the extent that SORNA requires a sex offender to register in a way that the Wetterling Act did not, but the relevant State has not yet come into compliance with SORNA's enhanced registration re-

[17] The provision imposing federal criminal liability for a violation of the Wetterling Act, 42 U.S.C. 14072(i), was repealed by a provision of SORNA that took effect on July 27, 2009. See SORNA §§ 124, 129, 120 Stat. 598, 600.

quirements, a sex offender could invoke the affirmative defense in Section 2250(b). That defense applies when an individual was "prevented * * * from complying" with SORNA by "uncontrollable circumstances" that were not attributable to the individual's "reckless disregard of the requirement to comply," as long as "the individual complied [with SORNA] as soon as such circumstances ceased to exist." 18 U.S.C. 2250(b)(1), (2) and (3). But when a defendant fails to avail himself of an existing state registration system, he has violated SORNA's requirements, as applicable to him. And that conduct is not simply a Wetterling Act violation.

2. Petitioner contends in the alternative (Br. 40-44) that if an offense under SORNA is not in fact complete until after a sex offender "knowingly fails to register" as required by SORNA, it would still violate the Ex Post Facto Clause (or Due Process Clause). In particular, petitioner argues (Br. 42) that, if the first two elements of the statute can be triggered by his pre-SORNA conviction and his pre-SORNA interstate travel, that would have the effect of making him "*immediately* guilty of failing to register under SORNA at the moment the Attorney General's retroactivity regulation took effect."

The government recognizes, as the court of appeals held, that the Ex Post Facto Clause prevents Congress from criminalizing a previously lawful course of conduct in such a way that a defendant is literally unable to avoid liability by altering his conduct. See Pet. App. 8a (the Ex Post Facto Clause "guarantee[s] that as long as [people] avoid an act in the future they can avoid punishment for something they did in the past, which cannot be altered"). There are, however, no concerns about the impossibility of compliance in petitioner's case. To the contrary, the court of appeals expressly (and appropri-

ately) concluded that petitioner had been afforded ample time to comply with SORNA by the time of his alleged violation in July 2007. *Id.* at 12a.

Petitioner criticizes (Br. 45-48) the court of appeals for construing the statute as giving sex offenders a "reasonable time" or "minimum grace period * * * greater than zero" (Pet. App. 10a, 12a) to come into compliance with SORNA's new registration requirement. Petitioner portrays (Br. 46, 47) that as an unprincipled "exercise in judicial lawmaking" that "has no basis in the statutory text" and will force lower courts to "confront a series of questions with no clear answers."

Although the court of appeals drew an analogy from contract law, Pet. App. 10a, its result was identical to this Court's reasoning in *Tranbarger*, which construed Missouri's statute "as allowing" railroads "some time—either three months, or *a reasonable time* more or less than that period"—to comply with the new requirement to construct outlets through their roadbeds. 238 U.S. at 74 (emphasis added); see also *United States* v. *Trupin*, 117 F.3d 678, 686 (2d Cir. 1997) (holding that a defendant prosecuted for possession of a stolen painting he acquired in 1980 "could have avoided conviction for possession by ceasing his possession within a reasonable time after the 1986 amendment" that made it a federal crime to "possess" stolen goods that have crossed state lines), cert. denied, 522 U.S. 1051 (1998); 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4(b) at 142 n.53 (1st ed. 1987) ("Of course, statutes sometimes allow a grace period if considerable effort will be needed to change [a] condition [that existed before enactment], and if the statute does not expressly provide for a grace period the courts may take the view that a reasonable time to comply must be allowed.").

It is thus a background principle of law that a defendant needs a reasonable time to comply with a statutory regime that would otherwise instantly penalize a status following entirely from then-lawful pre-enactment conduct. In Section 2250, that principle is reasonably captured in the affirmative defense for "uncontrollable circumstances" provided by Section 2250(b), which obviates any constitutional concerns that would arise from a bona fide inability to comply with the statute immediately upon its applicability.

Finally, although petitioner criticizes the court of appeals for inviting "a series of questions with no clear answers" about how to evaluate a "reasonable time," Br. 47, petitioner's own construction of the word "travels" in Section 2250(a)(2)(B) could not avoid that same series of grace-period questions in cases involving federal sex offenders who are prosecuted under Section 2250(a)(2)(A).

3. Assuming Section 2250(a) is construed as allowing a "reasonable time" to comply with SORNA's new registration requirements, petitioner had sufficient time to comply.

SORNA was enacted on July 27, 2006, and the Attorney General's regulation confirming applicability of SORNA's registration requirements to persons who were convicted of sex offenses before that date was published in the *Federal Register* on February 28, 2007. See 72 Fed. Reg. at 8897. Even if SORNA became applicable to petitioner on the latter date—as the court of appeals held, Pet. App. 12a—petitioner still had abundant opportunity to comply with SORNA's registration requirement. Petitioner moved from Alabama to Indi-

ana near the end of 2004.[18] He was not charged until August 22, 2007, with having failed to register in Indiana. *Id.* at 14a-15a. For several months after SORNA became applicable to him, therefore, he had failed to register.

That was a more-than-reasonable grace period—especially in the context of a statutory framework that typically allows a sex offender only "3 business days" to register "after each change of name, residence, employment, or student status." 42 U.S.C. 16913(c). The court of appeals thus correctly held that petitioner had more than ample time to come into compliance with SORNA's registration requirements, and therefore that no constitutional concern arose from the date the statute applied to petitioner.

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[18] See note 2, *supra*. As described in the PSR (¶ 17), the sex offender registration form that petitioner signed while he was still in Alabama "advised [him] that if he intended to establish a new residence, he needed to inform the local sheriff's office thirty (30) days prior to the move and also to inform law enforcement in the new location within ten (10) days." Cf. Pet. App. 8a (noting that the same was true for the other appellant in the court of appeals, who signed forms in South Carolina notifying him that upon moving elsewhere, he would have to "register with the appropriate official in the new state").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
LANNY A. BREUER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
RICHARD A. FRIEDMAN
Attorney

JANUARY 2010

APPENDIX

1. 18 U.S.C. 2250 provides in relevant part:

Failure to register

(a) IN GENERAL.—Whoever—

(1) is required to register under the Sex Offender Registration and Notification Act;

(2)(A) is a sex offender as defined for the purposes of the Sex Offender Registration and Notification Act by reason of a conviction under Federal law (including the Uniform Code of Military Justice), the law of the District of Columbia, Indian tribal law, or the law of any territory or possession of the United States; or

(B) travels in interstate or foreign commerce, or enters or leaves, or resides in, Indian country; and

(3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;

shall be fined under this title or imprisoned not more than 10 years, or both.

(b) AFFIRMATIVE DEFENSE.—In a prosecution for a violation under subsection (a), it is an affirmative defense that—

(1) uncontrollable circumstances prevented the individual from complying;

(2) the individual did not contribute to the creation of such circumstances in reckless disregard of the requirement to comply; and

(3) the individual complied as soon as such circumstances ceased to exist.

* * * * *

2. 42 U.S.C. 16911 provides:

Relevant definitions, including Amie Zyla expansion of sex offender definition and expanded inclusion of child predators

In this subchapter the following definitions apply:

(1) Sex offender

The term "sex offender" means an individual who was convicted of a sex offense.

(2) Tier I sex offender

The term "tier I sex offender" means a sex offender other than a tier II or tier III sex offender.

(3) Tier II sex offender

The term "tier II sex offender" means a sex offender other than a tier III sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, when committed against a minor, or an attempt or conspiracy to commit such an offense against a minor:

(i) sex trafficking (as described in section 1591 of Title 18);

(ii) coercion and enticement (as described in section 2422(b) of Title 18);

(iii) transportation with intent to engage in criminal sexual activity (as described in section 2423(a))[1] of Title 18;

(iv) abusive sexual contact (as described in section 2244 of Title 18);

(B) involves—

(i) use of a minor in a sexual performance;

(ii) solicitation of a minor to practice prostitution; or

(iii) production or distribution of child pornography; or

(C) occurs after the offender becomes a tier I sex offender.

(4) Tier III sex offender

The term "tier III sex offender" means a sex offender whose offense is punishable by imprisonment for more than 1 year and—

(A) is comparable to or more severe than the following offenses, or an attempt or conspiracy to commit such an offense:

(i) aggravated sexual abuse or sexual abuse (as described in sections 2241 and 2242 of Title 18); or

(ii) abusive sexual contact (as described in section 2244 of Title 18) against a minor who has not attained the age of 13 years;

(B) involves kidnapping of a minor (unless committed by a parent or guardian); or

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[1] So in original. The second closing parenthesis probably should follow "18".

(C) occurs after the offender becomes a tier II sex offender.

(5) Amie Zyla expansion of sex offense definition

(A) Generally

Except as limited by subparagraph (B) or (C), the term "sex offense" means—

(i) a criminal offense that has an element involving a sexual act or sexual contact with another;

(ii) a criminal offense that is a specified offense against a minor;

(iii) a Federal offense (including an offense prosecuted under section 1152 or 1153 of Title 18) under section 1591, or chapter 109A, 110 (other than section 2257, 2257A, or 2258), or 117, of Title 18;

(iv) a military offense specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note); or

(v) an attempt or conspiracy to commit an offense described in clauses (i) through (iv).

(B) Foreign convictions

A foreign conviction is not a sex offense for the purposes of this subchapter if it was not obtained with sufficient safeguards for fundamental fairness and due process for the accused under guidelines or regulations established under section 16912 of this title.

(C) Offenses involving consensual sexual conduct

An offense involving consensual sexual conduct is not a sex offense for the purposes of this subchapter if the victim was an adult, unless the adult was under the custodial authority of the offender at the time of the offense, or if the victim was at least 13 years old and the offender was not more than 4 years older than the victim.

(6) Criminal offense

The term "criminal offense" means a State, local, tribal, foreign, or military offense (to the extent specified by the Secretary of Defense under section 115(a)(8)(C)(i) of Public Law 105-119 (10 U.S.C. 951 note)) or other criminal offense.

(7) Expansion of definition of "specified offense against a minor" to include all offenses by child predators

The term "specified offense against a minor" means an offense against a minor that involves any of the following:

(A) An offense (unless committed by a parent or guardian) involving kidnapping.

(B) An offense (unless committed by a parent or guardian) involving false imprisonment.

(C) Solicitation to engage in sexual conduct.

(D) Use in a sexual performance.

(E) Solicitation to practice prostitution.

(F) Video voyeurism as described in section 1801 of Title 18.

(G) Possession, production, or distribution of child pornography.

(H) Criminal sexual conduct involving a minor, or the use of the Internet to facilitate or attempt such conduct.

(I) Any conduct that by its nature is a sex offense against a minor.

(8) Convicted as including certain juvenile adjudications

The term "convicted" or a variant thereof, used with respect to a sex offense, includes adjudicated delinquent as a juvenile for that offense, but only if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable to or more severe than aggravated sexual abuse (as described in section 2241 of Title 18), or was an attempt or conspiracy to commit such an offense.

(9) Sex offender registry

The term "sex offender registry" means a registry of sex offenders, and a notification program, maintained by a jurisdiction.

(10) Jurisdiction

The term "jurisdiction" means any of the following:

(A) A State.

(B) The District of Columbia.

(C) The Commonwealth of Puerto Rico.

(D) Guam.

(E) American Samoa.

(F) The Northern Mariana Islands.

(G) The United States Virgin Islands.

(H) To the extent provided and subject to the requirements of section 16927 of this title, a federally recognized Indian tribe.

(11) Student

The term "student" means an individual who enrolls in or attends an educational institution, including (whether public or private) a secondary school, trade or professional school, and institution of higher education.

(12) Employee

The term "employee" includes an individual who is self-employed or works for any other entity, whether compensated or not.

(13) Resides

The term "resides" means, with respect to an individual, the location of the individual's home or other place where the individual habitually lives.

(14) Minor

The term "minor" means an individual who has not attained the age of 18 years.

3. 42 U.S.C. 16912 provides:

Registry requirements for jurisdictions

(a) Jurisdiction to maintain a registry

Each jurisdiction shall maintain a jurisdiction-wide sex offender registry conforming to the requirements of this subchapter.

(b) Guidelines and regulations

The Attorney General shall issue guidelines and regulations to interpret and implement this subchapter.

4. 42 U.S.C. 16913 provides:

Registry requirements for sex offenders

(a) In general

A sex offender shall register, and keep the registration current, in each jurisdiction where the offender resides, where the offender is an employee, and where the offender is a student. For initial registration purposes only, a sex offender shall also register in the jurisdiction in which convicted if such jurisdiction is different from the jurisdiction of residence.

(b) Initial registration

The sex offender shall initially register—

(1) before completing a sentence of imprisonment with respect to the offense giving rise to the registration requirement; or

(2) not later than 3 business days after being sentenced for that offense, if the sex offender is not sentenced to a term of imprisonment.

(c) Keeping the registration current

A sex offender shall, not later than 3 business days after each change of name, residence, employment, or student status, appear in person in at least 1 jurisdiction involved pursuant to subsection (a) of this section and inform that jurisdiction of all changes in the information required for that offender in the sex offender registry. That jurisdiction shall immediately provide that infor-

mation to all other jurisdictions in which the offender is required to register.

(d) Initial registration of sex offenders unable to comply with subsection (b) of this section

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before July 27, 2006 or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) of this section.

(e) State penalty for failure to comply

Each jurisdiction, other than a Federally recognized Indian tribe, shall provide a criminal penalty that includes a maximum term of imprisonment that is greater than 1 year for the failure of a sex offender to comply with the requirements of this subchapter.

5. 42 U.S.C. 16914 provides:

Information required in registration

(a) Provided by the offender

The sex offender shall provide the following information to the appropriate official for inclusion in the sex offender registry:

(1) The name of the sex offender (including any alias used by the individual).

(2) The Social Security number of the sex offender.

(3) The address of each residence at which the sex offender resides or will reside.

(4) The name and address of any place where the sex offender is an employee or will be an employee.

(5) The name and address of any place where the sex offender is a student or will be a student.

(6) The license plate number and a description of any vehicle owned or operated by the sex offender.

(7) Any other information required by the Attorney General.

(b) Provided by the jurisdiction

The jurisdiction in which the sex offender registers shall ensure that the following information is included in the registry for that sex offender:

(1) A physical description of the sex offender.

(2) The text of the provision of law defining the criminal offense for which the sex offender is registered.

(3) The criminal history of the sex offender, including the date of all arrests and convictions; the status of parole, probation, or supervised release; registration status; and the existence of any outstanding arrest warrants for the sex offender.

(4) A current photograph of the sex offender.

(5) A set of fingerprints and palm prints of the sex offender.

(6) A DNA sample of the sex offender.

(7) A photocopy of a valid driver's license or identification card issued to the sex offender by a jurisdiction.

(8) Any other information required by the Attorney General.

6. 42 U.S.C. 16915 provides:

Duration of registration requirement

(a) Full registration period

A sex offender shall keep the registration current for the full registration period (excluding any time the sex offender is in custody or civilly committed) unless the offender is allowed a reduction under subsection (b) of this section. The full registration period is—

(1) 15 years, if the offender is a tier I sex offender;

(2) 25 years, if the offender is a tier II sex offender; and

(3) the life of the offender, if the offender is a tier III sex offender.

(b) Reduced period for clean record

(1) Clean record

The full registration period shall be reduced as described in paragraph (3) for a sex offender who maintains a clean record for the period described in paragraph (2) by—

(A) not being convicted of any offense for which imprisonment for more than 1 year may be imposed;

(B) not being convicted of any sex offense;

(C) successfully completing any periods of supervised release, probation, and parole; and

(D) successfully completing of[1] an appropriate sex offender treatment program certified by a jurisdiction or by the Attorney General.

(2) Period

In the case of—

(A) a tier I sex offender, the period during which the clean record shall be maintained is 10 years; and

(B) a tier III sex offender adjudicated delinquent for the offense which required registration in a sex registry under this subchapter, the period during which the clean record shall be maintained is 25 years.

(3) Reduction

In the case of—

(A) a tier I sex offender, the reduction is 5 years;

(B) a tier III sex offender adjudicated delinquent, the reduction is from life to that period for which the clean record under paragraph (2) is maintained.

7. 42 U.S.C. 16916 provides:

Periodic in person verification

A sex offender shall appear in person, allow the jurisdiction to take a current photograph, and verify the information in each registry in which that offender is required to be registered not less frequently than—

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[1] So in original. The word "of" probably should not appear.

(1) each year, if the offender is a tier I sex offender;

(2) every 6 months, if the offender is a tier II sex offender; and

(3) every 3 months, if the offender is a tier III sex offender.

8. 42 U.S.C. 16917 provides:

Duty to notify sex offenders of registration requirements and to register

(a) In general

An appropriate official shall, shortly before release of the sex offender from custody, or, if the sex offender is not in custody, immediately after the sentencing of the sex offender, for the offense giving rise to the duty to register—

(1) inform the sex offender of the duties of a sex offender under this subchapter and explain those duties;

(2) require the sex offender to read and sign a form stating that the duty to register has been explained and that the sex offender understands the registration requirement; and

(3) ensure that the sex offender is registered.

(b) Notification of sex offenders who cannot comply with subsection (a) of this section

The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered in accordance with subsection (a) of this section.

9. 42 U.S.C. 16918 provides:

Public access to sex offender information through the Internet

(a) In general

Except as provided in this section, each jurisdiction shall make available on the Internet, in a manner that is readily accessible to all jurisdictions and to the public, all information about each sex offender in the registry. The jurisdiction shall maintain the Internet site in a manner that will permit the public to obtain relevant information for each sex offender by a single query for any given zip code or geographic radius set by the user. The jurisdiction shall also include in the design of its Internet site all field search capabilities needed for full participation in the Dru Sjodin National Sex Offender Public Website and shall participate in that website as provided by the Attorney General.

(b) Mandatory exemptions

A jurisdiction shall exempt from disclosure—

(1) the identity of any victim of a sex offense;

(2) the Social Security number of the sex offender;

(3) any reference to arrests of the sex offender that did not result in conviction; and

(4) any other information exempted from disclosure by the Attorney General.

(c) Optional exemptions

A jurisdiction may exempt from disclosure—

(1) any information about a tier I sex offender convicted of an offense other than a specified offense against a minor;

(2) the name of an employer of the sex offender;

(3) the name of an educational institution where the sex offender is a student; and

(4) any other information exempted from disclosure by the Attorney General.

(d) Links

The site shall include, to the extent practicable, links to sex offender safety and education resources.

(e) Correction of errors

The site shall include instructions on how to seek correction of information that an individual contends is erroneous.

(f) Warning

The site shall include a warning that information on the site should not be used to unlawfully injure, harass, or commit a crime against any individual named in the registry or residing or working at any reported address. The warning shall note that any such action could result in civil or criminal penalties.

10. 42 U.S.C. 16919 provides:

National Sex Offender Registry

(a) Internet

The Attorney General shall maintain a national database at the Federal Bureau of Investigation for each sex offender and any other person required to register in a jurisdiction's sex offender registry. The database shall be known as the National Sex Offender Registry.

(b) Electronic forwarding

The Attorney General shall ensure (through the National Sex Offender Registry or otherwise) that updated information about a sex offender is immediately transmitted by electronic forwarding to all relevant jurisdictions.

11. 42 U.S.C. 16920 provides:

Dru Sjodin National Sex Offender Public Website

(a) Establishment

There is established the Dru Sjodin National Sex Offender Public Website (hereinafter in this section referred to as the "Website"), which the Attorney General shall maintain.

(b) Information to be provided

The Website shall include relevant information for each sex offender and other person listed on a jurisdiction's Internet site. The Website shall allow the public to obtain relevant information for each sex offender by a single query for any given zip code or geographical radius set by the user in a form and with such limitations as may be established by the Attorney General and shall have such other field search capabilities as the Attorney General may provide.

12. 42 U.S.C. 16921 provides:

Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program

(a) Establishment of Program

There is established the Megan Nicole Kanka and Alexandra Nicole Zapp Community Notification Program (hereinafter in this section referred to as the "Program").

(b) Program notification

Except as provided in subsection (c) of this section, immediately after a sex offender registers or updates a registration, an appropriate official in the jurisdiction shall provide the information in the registry (other than information exempted from disclosure by the Attorney General) about that offender to the following:

(1) The Attorney General, who shall include that information in the National Sex Offender Registry or other appropriate databases.

(2) Appropriate law enforcement agencies (including probation agencies, if appropriate), and each school and public housing agency, in each area in which the individual resides, is an employee or is a student.

(3) Each jurisdiction where the sex offender resides, is an employee, or is a student, and each jurisdiction from or to which a change of residence, employment, or student status occurs.

(4) Any agency responsible for conducting employment-related background checks under section 5119a of this title.

(5) Social service entities responsible for protecting minors in the child welfare system.

(6) Volunteer organizations in which contact with minors or other vulnerable individuals might occur.

(7) Any organization, company, or individual who requests such notification pursuant to procedures established by the jurisdiction.

(c) Frequency

Notwithstanding subsection (b) of this section, an organization or individual described in subsection (b)(6) or (b)(7) of this section may opt to receive the notification described in that subsection no less frequently than once every five business days.

13. 42 U.S.C. 16922 provides:

Actions to be taken when sex offender fails to comply

An appropriate official shall notify the Attorney General and appropriate law enforcement agencies of any failure by a sex offender to comply with the requirements of a registry and revise the jurisdiction's registry to reflect the nature of that failure. The appropriate official, the Attorney General, and each such law enforcement agency shall take any appropriate action to ensure compliance.

14. 42 U.S.C. 16923 provides:

Development and availability of registry management and website software

(a) Duty to develop and support

The Attorney General shall, in consultation with the jurisdictions, develop and support software to enable jurisdictions to establish and operate uniform sex offender registries and Internet sites.

(b) Criteria

The software should facilitate—

(1) immediate exchange of information among jurisdictions;

(2) public access over the Internet to appropriate information, including the number of registered sex offenders in each jurisdiction on a current basis;

(3) full compliance with the requirements of this subchapter; and

(4) communication of information to community notification program participants as required under section 16921 of this title.

(c) Deadline

The Attorney General shall make the first complete edition of this software available to jurisdictions within 2 years of July 27, 2006.

15. 42 U.S.C. 16924 provides:

Period for implementation by jurisdictions

(a) Deadline

Each jurisdiction shall implement this subchapter before the later of—

(1) 3 years after July 27, 2006; and

(2) 1 year after the date on which the software described in section 16923 of this title is available.

(b) Extensions

The Attorney General may authorize up to two 1-year extensions of the deadline.

16. 42 U.S.C. 16925 provides:

Failure of jurisdiction to comply

(a) In general

For any fiscal year after the end of the period for implementation, a jurisdiction that fails, as determined by the Attorney General, to substantially implement this subchapter shall not receive 10 percent of the funds that would otherwise be allocated for that fiscal year to the jurisdiction under part A of subchapter V of chapter 46 of this title.

(b) State constitutionality

(1) In general

When evaluating whether a jurisdiction has substantially implemented this subchapter, the Attorney General shall consider whether the jurisdiction is unable to substantially implement this subchapter because of a demonstrated inability to implement cer-

tain provisions that would place the jurisdiction in violation of its constitution, as determined by a ruling of the jurisdiction's highest court.

(2) Efforts

If the circumstances arise under paragraph (1), then the Attorney General and the jurisdiction shall make good faith efforts to accomplish substantial implementation of this subchapter and to reconcile any conflicts between this subchapter and the jurisdiction's constitution. In considering whether compliance with the requirements of this subchapter would likely violate the jurisdiction's constitution or an interpretation thereof by the jurisdiction's highest court, the Attorney General shall consult with the chief executive and chief legal officer of the jurisdiction concerning the jurisdiction's interpretation of the jurisdiction's constitution and rulings thereon by the jurisdiction's highest court.

(3) Alternative procedures

If the jurisdiction is unable to substantially implement this subchapter because of a limitation imposed by the jurisdiction's constitution, the Attorney General may determine that the jurisdiction is in compliance with this chapter if the jurisdiction has made, or is in the process of implementing[1] reasonable alternative procedures or accommodations, which are consistent with the purposes of this chapter.

(4) Funding reduction

If a jurisdiction does not comply with paragraph (3), then the jurisdiction shall be subject to a funding

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[1] So in original. Probably should be followed by a comma.

reduction as specified in subsection (a) of this section.

(c) Reallocation

Amounts not allocated under a program referred to in this section to a jurisdiction for failure to substantially implement this subchapter shall be reallocated under that program to jurisdictions that have not failed to substantially implement this subchapter or may be reallocated to a jurisdiction from which they were withheld to be used solely for the purpose of implementing this subchapter.

(d) Rule of construction

The provisions of this subchapter that are cast as directions to jurisdictions or their officials constitute, in relation to States, only conditions required to avoid the reduction of Federal funding under this section.

17. 42 U.S.C. 16926 provides:

Sex Offender Management Assistance (SOMA) program

(a) In general

The Attorney General shall establish and implement a Sex Offender Management Assistance program (in this subchapter referred to as the "SOMA program"), under which the Attorney General may award a grant to a jurisdiction to offset the costs of implementing this subchapter.

(b) Application

The chief executive of a jurisdiction desiring a grant under this section shall, on an annual basis, submit to the Attorney General an application in such form and

containing such information as the Attorney General may require.

(c) Bonus payments for prompt compliance

A jurisdiction that, as determined by the Attorney General, has substantially implemented this subchapter not later than 2 years after July 27, 2006 is eligible for a bonus payment. The Attorney General may make such a payment under the SOMA program for the first fiscal year beginning after that determination. The amount of the payment shall be—

(1) 10 percent of the total received by the jurisdiction under the SOMA program for the preceding fiscal year, if that implementation is not later than 1 year after July 27, 2006; and

(2) 5 percent of such total, if not later than 2 years after July 27, 2006.

(d) Authorization of appropriations

In addition to any amounts otherwise authorized to be appropriated, there are authorized to be appropriated such sums as may be necessary to the Attorney General, to be available only for the SOMA program, for fiscal years 2007 through 2009.

18. 42 U.S.C. 16927 provides:

Election by Indian tribes

(a) Election

(1) In general

A federally recognized Indian tribe may, by resolution or other enactment of the tribal council or comparable governmental body—

(A) elect to carry out this part as a jurisdiction subject to its provisions; or

(B) elect to delegate its functions under this part to another jurisdiction or jurisdictions within which the territory of the tribe is located and to provide access to its territory and such other cooperation and assistance as may be needed to enable such other jurisdiction or jurisdictions to carry out and enforce the requirements of this part.

(2) Imputed election in certain cases

A tribe shall be treated as if it had made the election described in paragraph (1)(B) if—

(A) it is a tribe subject to the law enforcement jurisdiction of a State under section 1162 of Title 18;

(B) the tribe does not make an election under paragraph (1) within 1 year of July 27, 2006 or rescinds an election under paragraph (1)(A); or

(C) the Attorney General determines that the tribe has not substantially implemented the requirements of this part and is not likely to become capable of doing so within a reasonable amount of time.

(b) Cooperation between tribal authorities and other jurisdictions

(1) Nonduplication

A tribe subject to this part is not required to duplicate functions under this part which are fully carried out by another jurisdiction or jurisdictions within which the territory of the tribe is located.

(2) Cooperative agreements

A tribe may, through cooperative agreements with such a jurisdiction or jurisdictions—

(A) arrange for the tribe to carry out any function of such a jurisdiction under this part with respect to sex offenders subject to the tribe's jurisdiction; and

(B) arrange for such a jurisdiction to carry out any function of the tribe under this part with respect to sex offenders subject to the tribe's jurisdiction.

19. 42 U.S.C. 16928 provides:

Registration of sex offenders entering the United States

The Attorney General, in consultation with the Secretary of State and the Secretary of Homeland Security, shall establish and maintain a system for informing the relevant jurisdictions about persons entering the United States who are required to register under this subchapter. The Secretary of State and the Secretary of Homeland Security shall provide such information and carry out such functions as the Attorney General may direct in the operation of the system.

20. 42 U.S.C. 16941 provides:

Federal assistance with respect to violations of registration requirements

(a) In general

The Attorney General shall use the resources of Federal law enforcement, including the United States Mar-

shals Service, to assist jurisdictions in locating and apprehending sex offenders who violate sex offender registration requirements. For the purposes of section 566(e)(1)(B) of Title 28, a sex offender who violates a sex offender registration requirement shall be deemed a fugitive.

(b) Authorization of appropriations

There are authorized to be appropriated such sums as may be necessary for fiscal years 2007 through 2009 to implement this section.

REPLY BRIEF

Supreme Court, U S
FILED
FEB 16 2010
OFFICE OF THE CLERK

No. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602

Counsel for the Petitioner

BOTH 50IISW

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REPLY BRIEF FOR PETITIONER

The government's brief is remarkable in one respect: Although this case is one of statutory construction, the government dismisses outright the statutory text. It thus insists that Congress's choice of verb tense is "not very revealing" (U.S. Br. 17); that "travels" should be read to mean "previously traveled" (*id.* at 25); and that "is required to register under [SORNA]" really means "was convicted of a sex offense" (*id.* at 19-20). These linguistic transmutations, upon which the government hinges its case, should not prevail. The declaration that "[w]hen *I* use a word * * * it means just what I choose it to mean—neither more nor less" was difficult enough to credit when it came from Humpty Dumpty in casual conversation (Lewis Carroll, *Alice's Adventures in Wonderland and Through the Looking-Glass* 186 (Hugh Haughton ed., Penguin Classics 1998) (1865)); it is not a plausible basis for the interpretation of a statute.

The government engages in a similarly exhausting set of verbal gymnastics while trying to save SORNA from unconstitutionality under the Ex Post Facto Clause. It thus maintains that a defendant's failure to register in conformity with the *existing* requirements of the Wetterling Act is punishable as a *new* offense subject to SORNA's greatly enhanced penalties. And it candidly acknowledges that SORNA *is* unconstitutional unless the Court reads into the statute a "reasonable time to comply" limitation (U.S. Br. 40) that appears nowhere in the statutory text—and that the Attorney General could have established by regulation, but did not. The government thus urges the Court to engage in the very sort of judicial lawmaking that it has long eschewed. Here,

the correct approach to SORNA is the easy one: The Court should read the statute to mean what Congress plainly wrote, an outcome that avoids both unconstitutionality and the need for creative judicial tinkering.

A. Section 2250(a)(2)(B) Applies Only To Persons Who Travel In Interstate Commerce After The Enactment Of SORNA.

It is enough to resolve this case that the government has no answer to our argument from SORNA's plain language. To begin with, the government does not, and surely could not, deny that the ordinary meaning of the verb "travels" encompasses travel occurring now or in the future, and not long-completed travel that occurred in the past. See Pet. Br. 17-21. The government thus does not cite, and presumably is unaware of, *any* decision of *any* court (other than the holding below in this case) interpreting a criminal statute's use of a present-tense verb to reach pre-enactment, completed conduct. The government does assert more generally that Congress's choice of verb tense says very little about the temporal reach of the statute in which the verb appears, but the Court has already rejected that improbable proposition: Use of the present tense is "[o]ne of the most striking indicia of [a statute's] prospective orientation." *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found.*, 484 U.S. 49, 59 (1987).[1]

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[1] The government dismisses decisions like *Gwaltney* on the ground that they interpreted laws in which present-tense verbs were used in relation to "another act mentioned in the statute." U.S. Br. 18 n.5. But even if that were so, we note below that § 2250(a)(2) itself uses "travels" in relation to the present requirement to register under SORNA.

The government nevertheless attempts to escape from this ordinary usage by observing that statutory words must be read in context. U.S. Br. 17. But while that surely is true, we doubt that "context" can ever justify reading "up" to mean "down," or "travels" as "traveled long ago." And even if it could, we showed in our opening brief that the statutory context confirms our reading: *Every* verb in § 2250(a)(2)(B), and in § 2250(a) more generally, is written in the present tense so as to be forward looking. Pet. Br. 22-23. It is nonsensical to read at least some of these verbs as referring to past conduct; for example, we noted in our opening brief that "resides in Indian country" simply cannot be taken to mean "resided for many years in Indian country but left, never to return." Pet. Br. 23. So if, as the government says, "words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (U.S. Br. 17-18 (quoting *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 809 (1989)), the government cannot prevail here.

That is especially so because other provisions of the Adam Walsh Act, in notable contrast to § 2250(a)(2)(B), revised the definitions of crimes that *are* written in the past tense. Section 206 of the Adam Walsh Act, amending 18 U.S.C. § 2252(a)(2), punishes any person who "knowingly receives, or distributes, any visual depiction * * * that *has been mailed*, or *has been shipped* or *transported* in or affecting interstate or foreign commerce" (emphasis added). Section 2252A(a)(2), amended by the same section of the Walsh Act, similarly punishes any person who "knowingly receives or distributes any child pornography that *has been mailed* * * * or any material that contains child pornography that *has been mailed*" (emphasis added). And SORNA's own af-

firmative defense specifies past conduct as a trigger, referring to circumstances that "prevented" an individual from complying with SORNA when that individual "complied as soon as such circumstances ceased to exist." 18 U.S.C. § 2250(b)(1), (3). Congress accordingly knew very well how to reach past conduct and chose not to do so in § 2250(a)(2)(B). The Court should honor that choice. See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009).[2]

2. The government also draws support from what it terms its "sequential reading" of § 2250(a)'s elements, under which a sex offender may be convicted of SORNA's failure-to-register offense only if he or she, in order, (1) is required to register under SORNA, (2) travels in interstate commerce, and (3) then knowingly fails to register under SORNA. U.S. Br. 18-21. This understanding of the statute is perfectly plausible, if not compelled by the statutory language, and we do not now dispute it. But here, too, the government's reading confirms our understanding of SORNA.

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[2] The Dictionary Act, 1 U.S.C. § 1, which allows for consideration of the surrounding statutory text or related statutory provisions as an aid to construction (see *Rowland* v. *Cal. Men's Colony*, 506 U.S. 194, 199-200 (1993)), therefore supports our reading. In arguing to the contrary, the government points to the contrast between SORNA and a 1962 statute that requires registration by a person who receives a gambling device "knowing that it has been transported in interstate or foreign commerce after the effective date of the Gambling Devices Act of 1962." U.S. Br. 21 n.8 (citing 15 U.S.C. § 1173(a)(3)). But that statute proves our point: It is written in the past-perfect form ("has been transported"), and it is only to restrict the law's retrospective scope that Congress added the "after the effective date" limitation.

The first of these elements, which appears in § 2250(a)(1)—the element the government maintains must occur first in time—is that the defendant "is required to register under the Sex Offender Registration and Notification Act." And on the face of it, under any ordinary understanding of this language, one "is" required to register "under" SORNA only *after* SORNA's enactment. The government gamely disagrees, asserting that the statutory requirement of an obligation to register "under [SORNA]" actually "is a shorthand way of identifying those persons who have a conviction in the classes identified by SORNA." U.S. Br. 19-20. But that very simply is not what the statute says, and the Court is "not free to rewrite the statute that Congress has enacted." *Dodd* v. *United States*, 545 U.S. 353, 359 (2005).[3]

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[3] Reading "under [SORNA]" in § 2250(a)(1) to mean "committed a sex offense in the past" has further ramifications. Section 141 of the Adam Walsh Act not only created 18 U.S.C. § 2250, but also amended 18 U.S.C. § 3583(k) to provide: "If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under [various sex offense chapters], the court shall revoke" supervised release and impose five years' further imprisonment. This provision's "required to register under [SORNA]" language mirrors § 2250(a)(1), and its present-tense "commits any criminal offense" is analogous to the present-tense "travels" in § 2250(a)(2)(B). One accordingly would expect a similar reading of the analogous provisions in §§ 2250(a)(1)-(2) and 3583(k). But reading § 3583(k) as the government reads § 2250(a) would mean that someone who had been convicted of a sex offense and then committed one of the enumerated criminal offenses pre-SORNA would, upon SORNA's enactment, be subject to five years further imprisonment. Even apart from the ex post facto problems in such a construction, it is a most improbable reading of Congress's intent.

And although it should not be necessary to gild this lily, the extent of the government's departure from SORNA's plain meaning is again confirmed by additional statutory context. Congress in fact used a formulation that comes close to the government's reading of § 2250(a)(1)—but it did so in § 2250(a)(2)(A), the portion of SORNA's *second* element that is directed to federal sex offenders, where it made the statute applicable to a person who "is a sex offender as defined for the purposes of [SORNA] by reason of a conviction under Federal law."[4] In notable contrast to this formula, however, § 2250(a)(1) refers not to a person who "is a sex offender," but to one who "is required to register under [SORNA]." This must refer to the registration requirement that came into being only after SORNA's enactment.

Indeed, the government itself recognizes that the third element of SORNA's criminal offense, appearing in § 2250(a)(3)—which refers to a person who "knowingly fails to register or update a registration as required by [SORNA]"—"plainly requires conduct that occurs after SORNA applies: a failure to comply with its registration requirements." U.S. Br. 20. Yet the language of the first element ("is required to register under [SORNA]") is virtually identical to that of the third ("fails to register * * * as required by [SORNA]").[5] The first element, like the third, there-

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[4] Actually, even this language does not get quite as far into the past as the government would like; "is a sex offender as defined for purposes of [SORNA]" is a present-tense formulation that focuses on the offender's current legal status.

[5] That Congress used the word "under" as a substitute for "as required by" in the first but not the third element plainly is a consequence of its *already* having used the word "required" elsewhere in the first element; it would have been very awk-

fore also could not be satisfied until after SORNA's enactment. See *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2301 (2009) (interpreting similar structure in adjacent provisions similarly). And because the government posits that the relevant interstate travel must have occurred *after* the first element of the crime (attachment of the SORNA registration requirement), a SORNA conviction must be premised on post-SORNA travel.[6]

3. The government also maintains that our reading of SORNA creates an "anomaly" because it would permit prosecution of all unregistered sex offenders who were convicted under federal or tribal law, but only those unregistered sex offenders convicted under state or foreign law who "traveled in interstate or foreign commerce after SORNA's enactment." U.S. Br. 21-22. But this argument proves too much. SORNA requires most sex offenders to register whether convicted under state or federal law, but

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ward for paragraph (a)(1) to say "is *required* to register as *required* by the Sex Offender Registration and Notification Act."

[6] The government reprises our example of the sex offender who crossed state lines as an infant, suggesting that prosecution of such an offender is allowed by our but not its reading of SORNA. U.S. Br. 27. That is not so; we have no quarrel with the government's "sequential reading" of SORNA's elements. (The government had not committed itself to such a reading before the filing of its brief in this Court.) But because the government starts the sequence with events occurring before SORNA's enactment, its approach still leads to very peculiar results. For example, under its reading a person who committed a sex offense in 1950 and crossed state lines once to see his dentist in 1956 is subject to prosecution for failure to register under SORNA. It is not at all clear why Congress would have regarded interstate travel taking place fifty years before SORNA's enactment as a logical trigger for criminal liability under SORNA.

under any reading of the statute it allows for federal prosecution only of a subset of those who fail to register. The government's own approach, for example, draws distinctions that might be thought arbitrary. Its "sequential" reading does not allow for federal prosecution under SORNA of offenders who crossed state lines before committing their offenses (even if they crossed state lines *to* commit the offense), or who never crossed state lines at all—meaning that an offender who moves from Kansas City, Missouri, to Kansas City, Kansas is subject to federal prosecution, but one who moves from Montauk to Buffalo is not. Such statutory line drawing is unavoidable. See, *e.g.*, *Fiallo* v. *Bell*, 430 U.S. 787, 795 n.6 (1977).

It may be added that distinguishing between federal and state offenders in a federal criminal statute, as Congress expressly did in SORNA, is not anomalous at all. The government itself has recently explained why Congress would have given the United States greater responsibility to police the activities of federal than of state sex offenders: "[A]s a result of the federal government's incarceration of [sexually dangerous] persons, Congress could reasonably conclude that the government has a special responsibility to protect the public from the dangers that could ensue from the government's own release of them." Brief for the United States at 20, *United States* v. *Comstock*, No. 08-1224 (2009) (defending the civil commitment provisions of the Adam Walsh Act). "Moreover, the federal government often has a continuing relationship with prisoners who are released from federal prison * * * as a result of provisions for supervised release." *Ibid.* And in addition to these custodial considerations, Congress might have thought that offenders with federal-law convictions "are the people who are most likely to violate Federal

laws based on the Commerce Clause in the future * * *." Transcript of Oral Argument at 24:6-8, *United States* v. *Comstock*, No. 08-1224 (Jan. 12, 2010) (argument of Solicitor General Kagan). It therefore is not surprising that SORNA's criminal provision applies universally to federal, but not to state, offenders who fail to register.

4. The government resorts finally to what it describes as the purpose of SORNA. Relying almost exclusively on a House Judiciary Committee report, the government contends that in enacting SORNA Congress was most concerned with "the problem of 'missing' sex offenders," which "typically" occurs when offenders move from one State to another. U.S. Br. 23 (citation omitted). From this, the government concludes that Congress intended to subject to SORNA criminal prosecution sex offenders who traveled in interstate commerce before SORNA's enactment. *Id.* at 22-25. But this argument founders for an obvious reason: "[V]ague notions of a statute's 'basic purpose' are * * * inadequate to overcome the words of its text regarding the *specific* issue under consideration." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 261 (1993). Even a clear expression in the legislative history could not overcome the wholly unambiguous present-tense text that Congress chose to place in SORNA—let alone a vague snippet of history that says nothing at all about SORNA's criminal provision in general or the question of pre-SORNA travel in particular.

More than that, though, the government's reading of the history is wrong on its own terms. As the government acknowledges (U.S. Br. 24 n.9), when the House report upon which it relies was written the House bill expressly did *not* reach pre-SORNA interstate travel. Instead, it allowed for prosecution

of a person who "receives a notice from an official that such person is required to register under [SORNA] and— * * * thereafter travels in interstate * * * commerce." H.R. Rep. No. 109-218, pt. 1 (2005), at 9. As this language unambiguously refers to post-SORNA conduct—even the government appears to agree that notification of the SORNA registration requirement could occur only after SORNA's enactment, with the necessary travel to occur after that—the one thing we know for certain is that the authors of that report did *not* believe that the problem of "missing" offenders it described should be addressed through prosecution of persons who traveled in interstate commerce before the SORNA registration requirement attached. The government therefore is manifestly wrong in declaring that a sex offender who traveled in interstate commerce prior to SORNA's enactment has "engaged in the very conduct that motivated congressional action" (*id.* at 25) and that petitioner himself "is a paradigmatic example" of the problem addressed in the House report (*id.* at 23). If the government were correct, the authors of that report surely would not have expressly excluded persons like petitioner from the scope of the bill.

The government does halfheartedly suggest that tweaks to this language in subsequent versions of SORNA support the inference "that Congress concluded it could more effectively reach missing sex offenders by making the statute applicable to pre-SORNA travel." U.S. Br. 24 n.9. But this proposition, too, is wrong. The initial bill stated, in relevant part, that "[w]hoever receives a notice from an official that such person is required to register under [SORNA] and * * * thereafter travels in interstate or foreign commerce" commits an offense. H.R. 3132, 109th

Cong. § 151 (as reported by H. Comm. on the Judiciary, Sept. 9, 2005). A subsequent House version simplified this language to state: "Whoever is required to register under [SORNA] and * * * thereafter travels in interstate or foreign commerce" commits an offense. H.R. 3132, 109th Cong. § 151 (as passed by House, Sept. 14, 2005). That bill died in the Senate, but was reintroduced in the House still containing "thereafter." H.R. 4472, 109th Cong. § 151 (as introduced in House, Dec. 8, 2005). After neither committee markups nor hearings, the bill was introduced on the floor with "thereafter" deleted, whereupon it promptly passed on March 8, 2006, without further amendment. 152 Cong. Rec. H662, H677 (daily ed. Mar. 7, 2006).[7] Section 2250(a)(1) and (a)(2)(B) remained unchanged in the enacted statute.

Against this background, it evidently is the government's suggestion that the move from (1) "receives a notice from an official that such person is required to register" to (2) "is required to register" was intended to work a fundamental change in the temporal reach of the statute, even though that change did *not* necessitate removal of "thereafter" from "thereafter travels." On the face of it, this is a most improbable proposition. The far more likely explanation is that Congress sought to remove the actual-notice dimension of the first element and then, much later, simply dropped the "thereafter" language

[7] Deletion of the "thereafter travels" language was not a substantive amendment, as the government implicitly concedes in adopting its "sequential" reading of SORNA. Indeed, all of the amendments made at the same time were nonsubstantive. Compare H. 4472, 109th Cong. (as introduced in House, Dec. 8, 2005) with H. 4472, 109th Cong. § 151 (as passed by House, March 8, 2006).

for stylistic reasons as superfluous—as it in fact was, given the statute's use of the present-tense "travels." *United States* v. *Husted*, 545 F.3d 1240, 1247 (10th Cir. 2008).[8]

As we explained in our opening brief (at 31-33), Congress would have seen no reason to distinguish between unregistered offenders who had traveled in interstate commerce prior to SORNA's enactment and those who had not traveled interstate at all. The government disagrees, asserting that Congress acted out of concern about pre-SORNA interstate travel. U.S. Br. 25. But as the House report excerpt quoted by the government itself suggests, enactment of SORNA was motivated by the *fact* of nonregistration, however accomplished. Congress responded to this problem by using SORNA to close registration "loopholes" through the creation of uniform registration standards that facilitate cooperation between the States in the tracking of sex offenders. See Pet. Br. 29-31. *Post*-SORNA travel could allow evasion of

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[8] The government does point to one substantive amendment to SORNA: The version of the bill introduced in the House included a longer maximum penalty than the version Congress ultimately passed. U.S. Br. at 24 n.9. But this change occurred in the Senate after the House passed a version of SORNA that did not include the word "thereafter." Compare H.R. 4472, 109th Cong. § 151 (as received by Senate, March 9, 2006) (providing for maximum twenty year penalty) with H.R. 4772, 109th Cong. § 151 (as passed by Senate, July 20, 2006). The substantive amendment to which the government points—which, after all, *diminished* the extent of criminal liability—thus occurred in a different house and at a different stage in the legislative process from the deletion of "thereafter." It lends no support to the government's claim that the prior deletion of "thereafter" was something other than a stylistic change intended to avoid redundancy.

these new standards and therefore was made the trigger for SORNA prosecution. The government makes no response to this point.

5. Finally, although the clarity of the statutory text makes resort to canons of construction unnecessary, the ordinary rules of statutory interpretation in fact favor our reading. The government's insistence that the presumption against retroactivity is wholly subsumed in the criminal context by the Ex Post Facto Clause simply ignores *Johnson* v. *United States*, 529 U.S. 694, 701 (2000), where the Court stated that the retroactivity presumption and the constitutional rule are "[q]uite independent" of one another. And because neither the statutory language (which even the government does not contend actually *favors* its reading) nor the legislative history (which says nothing specific about the question in this case at all) tips the matter in the government's direction, lenity principles require that any doubt be resolved in favor of petitioner.[9]

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[9] The government's seeming suggestion that the rule of lenity applies only when the defendant's conduct was innocuous (U.S. Br. 29) is wrong. See, *e.g.*, *Williams* v. *United States*, 458 U.S. 279 (1982) (applying the rule of lenity to a check kiting scheme). And the "wrongfulness" of petitioner's conduct is in any event hardly "incontestable," as the government would have it (U.S. Br. 30); civil registration requirements for sex offenders, let alone criminal penalties for failure to register, were virtually unknown until recent years.

B. The Ex Post Facto Clause Precludes Prosecution Under SORNA Of A Person Whose Travel In Interstate Commerce Predated SORNA's Enactment.

We are in agreement with the government on the basic ex post facto principles that apply here. We recognize, as the government maintains, that the Ex Post Facto Clause does not bar prosecution when conviction requires proof of an element occurring after enactment of the statute creating the offense. And the government agrees with us that the Ex Post Facto Clause *is* violated when "a defendant is literally unable to avoid liability by altering his conduct." U.S. Br. 38. The government, however, cannot reconcile its application of SORNA with these principles.

1. In our opening brief, we showed that the prosecution of petitioner was constitutionally dubious in one of two respects: either he was convicted under SORNA for a past failure to comply with the Wetterling Act, an outcome that improperly inflicted a greater punishment "than the law annexed to the crime, when committed" (*Johnson*, 529 U.S. at 699 (citation omitted)); or he was given no opportunity to comply with the new SORNA requirement. See Pet. Br. 36-37. In its brief, the government appears to have placed its chips on the theory giving rise to the second of these problems, declaring that "Section 2250(a) does not punish a violation of the registration requirement provided by the Wetterling Act, but rather a violation of the new registration requirement imposed by SORNA." U.S. Br. 37.

On examination, however, the government's basis for prosecuting SORNA cases—and its understanding of SORNA's requirements—is considerably less clear. It agrees with us "that defendants are not

liable under Section 2250 for failing to comply with [SORNA's] heightened [registration] requirements 'during the interval when States are not [yet] compliant with SORNA.'" U.S. Br. 37. It therefore declares that, "[t]o the extent that SORNA requires a sex offender to register in a way that the Wetterling Act did not, but the relevant State has not yet come into compliance with SORNA's enhanced registration requirements, a sex offender could invoke the affirmative defense in Section 2250(b)." *Id.* at 37-38. It continues, however, that "when a defendant fails to avail himself of an existing state registration system, he has violated SORNA's requirements, as applicable to him." *Id.* at 38. "And that conduct," the government concludes, "is not simply a Wetterling Act violation." *Ibid.*

Even on a second reading, this account leaves in some doubt exactly what conduct the government believes is currently required by SORNA. As we understand it, though, in the government's view (1) prosecution for failure to comply with the registration requirements actually created by SORNA currently is precluded by the impossibility of complying with those requirements (in every State of the Union but Ohio); but (2) a defendant nevertheless may be prosecuted *under SORNA*—and subjected to SORNA's greatly enhanced penalties—for failure to register after SORNA's enactment pursuant to the *pre-SORNA Wetterling Act's registration procedures.* For reasons both statutory and constitutional, this reading of SORNA's criminal provision is problematic.

First, the government's reading distorts the statutory language beyond recognition. The SORNA crime includes the elements of being required to, and

knowingly failing to, register "under" and "as required by" SORNA. SORNA details both the content of the information to be provided by a SORNA registrant and the means by which registration is to be accomplished (see 42 U.S.C. §§ 16914, 16916)—differing in both respects from the pre-existing Wetterling Act regime.[10] See Pet. Br. 4-6. Yet nothing in SORNA's language or structure suggests that, when registration "as required by [SORNA]" is impossible, Congress intended to substitute "as required by the Wetterling Act," attaching the new ten-year penalty to a failure to comply with the pre-SORNA requirements. The statutory language nowhere provides for such an outcome; and even if SORNA's terms could be stretched that far, they do not provide constitutionally adequate notice that failure to register as required by Wetterling is subject to the new SORNA penalty. *Cf. Smith* v. *Goguen*, 415 U.S. 566, 575-576 (1974) (impermissible vagueness in defining prohibited conduct); *Lambert* v. *California*, 355 U.S. 225, 229-230 (1957) (inadequate notice of crime's scope).

Second, the government's approach fails to vitiate the ex post facto problem in this case. Its position appears to be that pre-SORNA compliance with the Wetterling Act is sufficient to avoid SORNA liability

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[10] As noted in the opening brief (Pet. Br. 9), prosecution under the Wetterling Act remains possible. See SORNA §§ 129, 124, 120 Stat. at 600, 598 (codified in part at 42 U.S.C. § 16924) (tying the repeal of the Wetterling Act to the deadline for States to implement SORNA); Att'y Gen. Order No. 3081-2009, available at http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf (giving States a one-year extension, until July 26, 2010, to implement SORNA). The government offers no reason to believe that is not true, although it contends otherwise. See U.S. Br. 37 n.17 (failing to cite the one-year extension).

(U.S. Br. 37-38); the government thus is not, so far as we are aware, prosecuting Wetterling-compliant individuals for failure to re-register, post-SORNA, in the same pre-SORNA Wetterling registries. Had petitioner complied with the Wetterling requirements prior to SORNA's enactment, he therefore would not now be subject to prosecution under SORNA. The practical reality accordingly is that petitioner's *pre-SORNA* failure to register is what subjects him to prosecution under SORNA now. And that, of course, is the very definition of an Ex Post Facto Clause violation. In these circumstances, where pre-SORNA compliance with the Wetterling Act would preclude prosecution, it is not a sufficient answer for the government to assert without support that petitioner is being punished for his post-SORNA unregistered status.

2. In any event, even if SORNA is thought to punish post-enactment failure to comply with a new registration requirement, the government recognizes that a statute violates the Ex Post Facto Clause if the defendant is unable to avoid criminal liability by altering his or her conduct after the statute took effect. The government therefore concedes that SORNA, which appears to create immediate criminal liability and contains no express grace period within which offenders may register, cannot be enforced as written. U.S. Br. 38-39. For several reasons, SORNA cannot be saved from this defect by the government's proposal of a judicial revision to interpolate a "reasonable" grace period into the statute.

First, we note that the government's approach departs in significant respects from the Seventh Cir-

cuit's construction of SORNA.[11] The government appears to disavow the contract analogy upon which the court of appeals based its ruling. See U.S. Br. 39. And although the Seventh Circuit read allowance of a reasonable time to comply into the statute as an unstated term (see Pet. App. 12a-13a), the government instead posits that "[i]n Section 2250" the need for a grace period "is reasonably captured in the affirmative defense for 'uncontrollable circumstances' provided by Section 2250(b)." U.S. Br. 40. The government thus would place the burden of establishing the appropriate "grace period" on the defendant.

Second, the SORNA affirmative defense invoked by the government does not appear to have been di-

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[11] The government did not argue before the Seventh Circuit either that the SORNA affirmative defense could apply in this case (or the companion case *Dixon*) or that SORNA includes a registration grace period. Its current position on both of these points is in some tension with its conduct in prior litigation, where it gave sex offenders little or no time to register after SORNA became applicable to them. In a number of cases, the indictment charged the defendant with failure to register from either before or immediately after he became subject to the registration requirement. See, *e.g.*, *United States* v. *Hinckley*, 550 F.3d 926 (10th Cir. 2008) (defendant charged with failure to register from March 4, 2004 to January 24, 2007); *United States* v. *Chatterson*, No. 2:08-cr-144-FtM-99DNF, 2009 WL 804617 (M.D. Fla. Mar. 26, 2009) (defendant charged with failure to register from February 28, 2007); *United States* v. *Fuller*, No. 5:07-CR-462 (FJS), 2008 WL 4240485 (N.D.N.Y. Sept. 12, 2008) (defendant charged with failure to register from September 2006); *United States* v. *Cardenas*, No. 07-80108-CR, 2008 WL 896206 (S.D. Fla. Mar. 31, 2008) (defendant charged with failure to register from February 2007); *United States* v. *Nugent*, No. 07-5056-01-CRSW-GAF, 2008 WL 413273 (W.D. Mo. Feb. 13, 2008) (defendant charged with failure to register from March 20, 2006).

rected by Congress at circumstances like those here. By providing a defense when "uncontrollable circumstances prevented the individual from complying" with the SORNA registration requirement so long as "the individual complied as soon as such circumstances ceased to exist" (§ 2250(b)(1), (3)), the provision seems to contemplate conditions that precluded specific individuals from registering, not the creation of a generally applicable "reasonable time" tolling of SORNA's effective date. Presumably for this reason, the Attorney General's guidance on the defense focuses on SORNA's in-person registration requirement and peculiar circumstances unique to the defendant, such as hospitalization or a family emergency, that may delay registration.[12] So here, too, the government is departing from SORNA's text.

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[12] The Attorney General's discussion of impossibility was limited to the offender's personal circumstances and does not suggest recognition of a universal grace period:

> [S]ection 116 of SORNA requires periodic in-person appearances by sex offenders to verify their registration information. But in some cases this will be impossible, either temporarily (e.g., in the case of a sex offender hospitalized and unconscious because of an injury at the time of the scheduled appearance) or permanently (e.g., in the case of a sex offender who is in a persistent vegetative state). In other cases, the appearance may not be literally impossible, but there may be reasons to allow some relaxation of the requirement in light of the sex offender's personal circumstances. For example, a sex offender may unexpectedly need to deal with a family emergency at the time of a scheduled appearance, where failure to make the appearance will mean not verifying the registration information within the exact time frame specified by SORNA § 116. A jurisdiction may wish to authorize rescheduling of the appearance in such cases. Doing so would not necessarily undermine substantially the objectives of the SORNA verification require-

Third, the government invokes what it describes as the "background principle of law that a defendant needs a reasonable time to comply with a statutory regime that would otherwise instantly penalize a status." U.S. Br. 40. But this is a very thin reed upon which to construct a new statutory structure. The government cites only one decision of this Court, dating to 1915, that read such a limitation into a statute. U.S. Br. 39 (citing *Chicago & Alton R.R.* v. *Tranbarger*, 238 U.S. 67 (1915)). That case, moreover, involved an essentially regulatory state regime that imposed monetary penalties on railroads for failure to properly modify railbeds (see 238 U.S. at 71, 73), where a precise rule specifying the date of applicability was rather less important than it is under a statute providing for 10 years' imprisonment of an individual.[13] And in SORNA, Congress expressly

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ments, so long as the jurisdiction's rules or procedures require that the sex offender notify the official responsible for monitoring the sex offender of the difficulty, and that the appearance promptly be carried out once the interfering circumstance is resolved.

National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38,030, 38,048 (July 2, 2008).

[13] In addition, those rare instances where courts have recognized unwritten grace periods principally involve statutes that created continuous offenses; the LaFave treatise relied upon by the government (U.S. Br. 39) discusses such a grace period in the context of cases where "the offense is of a continuing nature." Wayne R. LaFave, *Criminal Law* § 2.4(b) at 115 (4th ed. 2003); see 1 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 2.4(b) at 142 n.53 (1st ed. 1987). In such a context, precision in identifying the moment liability attaches may be less important because there is no ending date for the act constituting the offense. See *Toussie* v. *United States*, 397 U.S. 112, 114-115 (1970). But the government expressly declines to argue that SORNA creates a continuing offense, declaring that "[w]hether Section 2250 does establish a continuing

delegated to the Attorney General the authority to specify how the statute would apply to persons who committed sex offenses before the date of enactment, presumably expecting the Attorney General to address compliance problems such as the one presented here. That the Attorney General neglected to do so does not give courts license to act in his place. SORNA therefore should be invalidated as applied in the circumstances here, rather than subjected to emergency judicial surgery to revive it.

3. If the Court agrees that the ex post facto concern here is a serious one, the constitutional doubt doctrine would support reversal of the decision below. See Pet. Br. 44-48. But even if it is thought that SORNA's constitutional defect *could* be cured by judicial recognition of a reasonable registration grace period, we showed in our opening brief that the interpretive difficulties spawned by such a course would themselves weigh strongly against judicial rewriting of the statute. *Id.* at 47-48.

The government makes no response to this point. It does not offer answers to any of the interpretive questions posed in our opening brief or attempt to

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offense is irrelevant to the constitutional question." U.S. Br. 34 n.15. In fact, the SORNA offense is not continuing in nature. In *Toussie*, which also involved a registration requirement, the Court explained that continuing offenses "are not to be implied except in limited circumstances," 397 U.S. at 121, and exist only when the "explicit language of the substantive criminal statute compels such a conclusion" or the "nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* at 115. Neither condition is satisfied by SORNA. See *id.* at 122 ("[T]here is * * * nothing inherent in the act of registration itself which makes failure to do so a continuing crime."); see generally Br. for Nat'l Ass'n of Crim. Def. Lawyers as *Amicus Curiae* at 10-11.

minimize the difficulty of those questions. Far from it: The reading of SORNA advanced in the government's brief itself raises additional interpretive problems. For one, if the "reasonable time" grace period is an aspect of SORNA's affirmative defense, as the government maintains, when does the statute of limitations for failure to register begin to run? For another, the government appears to accept that the five weeks allowed petitioner's co-appellant Dixon to register was insufficient (see U.S. Br. 12-13, 39-40); but if that is so, what about six weeks, or seven, or eight? Answering these questions requires "judicial lawmaking without any guidance from Congress" (*Cedar Rapids Cmty. Sch. Dist.* v. *Garrett F. by Charlene F.*, 526 U.S. 66, 77 (1999)), and that in itself is reason enough to reject the government's position.

Rather than dispute the problems that would be caused by its approach, the government contents itself with the observation that interpreting the word "travels" in § 2250(a)(2)(B) to apply only to post-SORNA travel "could not avoid that same series of grace-period questions in cases involving federal sex offenders who are prosecuted under Section 2250(a)(2)(A)." U.S. Br. 40. But that is hardly a sufficient response. Our reading would avoid those difficulties in all SORNA cases involving state offenders. As for federal offenders, they are differently situated from those convicted of state offenses; we have noted the government's recognition of its "continuing relationship with prisoners who are released from federal prison," which will tend to diminish SORNA problems of notice and *mens rea* for these offenders. See p. 8, *supra*. And however that may be, the possibility that difficult issues might (or might not) arise in a different set of future cases is no a reason for the

Court unnecessarily to start down the road of "[l]oose judicial reading" in *this* one. Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 545 (1947).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

DAN M. KAHAN
SCOTT L. SHUCHART
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

CHARLES A. ROTHFELD
Counsel of Record
ANDREW J. PINCUS
Mayer Brown LLP
1999 K Street, NW
Washington, DC 20006
(202) 263-3000

STANLEY L. CAMPBELL
Swanson & Campbell
One Star Financial
Bank Bldg.
127 W. Berry Street
Fort Wayne, IN 46802
(260) 422-4602
Counsel for the Petitioner

FEBRUARY 2010

AMICUS CURIAE BRIEF

No. 08-1301

In The
Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR THE STATES OF KANSAS, *ET AL.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

STEVE SIX
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
120 S.W. 10TH STREET, 2ND FLOOR
TOPEKA, KS 66612
(785) 296-2215

Counsel for Amici Curiae

January 25, 2010

[additional ~~counsel~~ listed inside cover]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

Troy King
Attorney General of Alabama
500 Dexter Avenue
Montgomery, Alabama 36130

Terry Goddard
Attorney General of Arizona
1275 West Washington
Phoenix, Arizona 85007-2926

Dustin McDaniel
Attorney General of Arkansas
323 Center Street
Little Rock, Arkansas 72201

John W. Suthers
Attorney General of Colorado
1525 Sherman St.
Seventh Floor
Denver, Colorado 80203

Kevin T. Kane
Chief State's Attorney
State of Connecticut
300 Corporate Place
Rocky Hill, Connecticut 06067

Joseph R. Biden, III
General of Delaware
820 North French Street
Wilmington, Delaware 19801

Bill McCollum
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399-1050

Thurbert E. Baker
Attorney General of Georgia
40 Capitol Square, SW
Atlanta, Georgia 30334

Mark J. Bennett
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813

Lawrence G. Wasden
Attorney General of Idaho
P.O. Box 83720
Boise, Idaho 83720-0010

Lisa Madigan
Attorney General of Illinois
100 W. Randolph St., 12th Floor
Chicago, Illinois 60601

Tom Miller
Attorney General of Iowa
1305 E. Walnut Street
Des Moines, Iowa 50319

Jack Conway
Attorney General of Kentucky
700 Capitol Avenue, Suite 118
Frankfort, Kentucky 40601

James D. "Buddy" Caldwell
Attorney General of Louisiana
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005

Janet T. Mills
Attorney General of Maine
6 State House Station
Augusta, Maine 04333

Douglas F. Gansler
Attorney General of Maryland
200 St. Paul Place
Baltimore, Maryland 21202

Martha Coakley
Attorney General of Massachusetts
One Ashburton Place
Boston, Massachusetts 02108

Steve Bullock
Attorney General of Montana
P.O. Box 201401
Helena, Montana 59620-1401

Michael A. Cox
Attorney General of Michigan
P. O. Box 30212
Lansing, Michigan 48909

Lori Swanson
Attorney General of Minnesota
102 State Capitol
75 Rev. Dr. Martin Luther King, Jr. Blvd.
St. Paul, Minnesota 55155-1609

Chris Koster
Attorney General of Missouri
207 West High Street
Jefferson City, Missouri 65101

Jon Bruning
Attorney General of Nebraska
P.O. Box 98920
Lincoln, Nebraska 98920

Michael A. Delaney
Attorney General of New Hampshire
33 Capitol Street
Concord, New Hampshire 03301

Gary K. King
Attorney General of New Mexico
P. O. Drawer 1508
Santa Fe, New Mexico 87504-1508

Wayne Stenehjem
Attorney General of North Dakota
600 E. Boulevard Avenue
Bismarck, North Dakota 58505-0040

Richard Cordray
Attorney General of Ohio
30 East Broad Street, 17th Floor
Columbus, Ohio 43215

W.A. Drew Edmondson
Attorney General of Oklahoma
313 N.E. 21st Street
Oklahoma City, Oklahoma 73105-4894

Thomas W. Corbett, Jr.
Attorney General of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

Henry D. McMaster
Attorney General of South Carolina
P.O. Box 11549
Columbia, South Carolina 29211

Robert E. Cooper, Jr.
Attorney General of Tennessee
P. O. Box 20207
Nashville, Tennessee 37202-0207

Greg Abbott
Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

Mark L. Shurtleff
Attorney General of Utah
Utah State Capitol Suite #230
P.O. Box 142320
Salt Lake City, Utah 84114-2320

Robert M. McKenna
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100

Bruce A. Salzburg
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002

QUESTIONS PRESENTED

1. Whether a conviction under 18 U.S.C. § 2250(a)(2)(B) may be predicated on interstate travel by the defendant before he or she became subject to the SORNA registration requirement.

2. Whether the Ex Post Facto Clause precludes prosecution under § 2250(a)(2)(B) of a person who was both convicted of a sex offense and traveled in interstate commerce before enactment of the SORNA.

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INTEREST OF THE *AMICI* STATES

The States' primary interest in this particular case is to caution the Court against any decision or language that would undermine over 200 years of the Court's *ex post facto* jurisprudence. That substantial body of law clearly holds that amendments to civil regulatory statutes are by definition "prospective" for *ex post facto* purposes, so long as some act is required of the regulated individuals following the new enactment. The Sex Offender Registration and Notification Act (SORNA) satisfies that standard.

The States have a strong interest in laws regulating sex offenders. To a great extent, the States have been the leaders in this area of the law. The States were the first sovereigns to develop and implement measures such as sex offender civil commitment programs, sex offender registration and notification laws, and greater criminal punishments for sex offenses generally and repeat offenders in particular.

The States recognize that Congress also has played an active role in this area, both in general and with respect to sex offender registration laws. Congress enacted spending power legislation in 1996 that attached the disbursement of certain federal funds to the condition that the States enact sex offender registration laws, as well as imposing federal standards on the laws to be enacted. As a result, sex offender registration laws have existed in all 50 States for well over a decade. Congress has amended and updated the federal requirements and statutes over time, ultimately resulting in the SORNA provisions now before the Court.

As this case and the enactment of the SORNA illustrate, one problem the States frequently have encountered in implementing sex offender registration laws is keeping track of offenders who are required to register but who are mobile and may relocate without informing authorities. That problem arises whether the offenders merely move within a city, they cross county lines within a state, or, in the situation the SORNA addresses, they cross state lines. The SORNA provision at issue here thus addresses a very real challenge that the States face in tracking many dangerous sex offenders subject to these civil registration laws.

The States themselves have with frequency amended and modified their own sex offender laws, particularly as experience has demonstrated shortcomings in those laws. Such amendments have included, for example, increasing the scope of those required to register, the amount of information made available to the public, and the punishment for an offender's failure to register as required. States, like Congress in the SORNA, have tried and continue to try to make these registration statutes as effective as possible in protecting the public.

The challenge in this case arises in the context of sex offender registration laws, which are indisputably civil, as the Court has expressly held. But the States have numerous civil regulatory systems that over time are amended and modified. The States should be free to make such changes—including imposing additional regulatory requirements—without having to defend them against baseless *ex post facto* claims.

SUMMARY OF THE ARGUMENT

The SORNA is not an *ex post facto* law.* Sex offender registration is a civil, non-punitive, regulatory scheme. *Smith v. Doe*, 538 U.S. 84 (2003). In that respect, it is akin to all sorts of civil regulation enacted by the States, including medical licensing, attorney licensing, liquor sale and distribution licensing, and many other regulatory schemes. Such civil regulatory schemes can be, and often are, changed, amended, and modified by the States, sometimes with the result that those being regulated are required to take new measures or are subject to new affirmative duties.

This Court's *ex post facto* jurisprudence makes clear that such changes in civil regulatory systems, even when enforced by criminal or civil penalties for noncompliance, are not *ex post facto* laws. Thus, although the SORNA imposes a criminal sanction for failure to comply with the law's civil registration requirement, that proposition has no effect on the *ex post facto* analysis. Rather, the key question for *ex post facto* purposes is whether those being regulated have both (1) the ability to comply and (2) a reasonable opportunity to comply with a new law's requirements before any punishment can be imposed.

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* The States take no position on the proper interpretation of SORNA as a matter of statutory construction (Question 1 in the Petition). This amicus brief solely and strictly addresses whether the SORNA, if construed to apply to petitioner here, is an *ex post facto* law (Question 2 in the Petition). The States argue that it is not.

For well over 100 years, this Court has made clear (and lower courts have many times reiterated) that so long as the person subject to regulation has the ability to comply with new legal duties and has a reasonable opportunity to engage in such compliance and thereby avoid any punishment, there is no *ex post facto* violation. Thus, the Court has upheld statutes imposing new affirmative duties such as to construct drainage openings in railroad beds, to dispose of liquor that was lawful when obtained but is no longer so, and to obtain additional credentials in order to continue holding a medical license. Lower courts similarly have upheld laws increasing failure to register as a sex offender from a misdemeanor to a felony, punishing the continuing possession of stolen property that has moved across state lines even though the interstate movement occurred prior to the law's effective date, and the imposition of criminal liability for money laundering based on commercial transactions entered into prior to a law's effective date but continued after the law took effect. Only when it was actually impossible for a regulated person to comply going forward—for example demanding a sworn oath that includes never having engaged in conduct in which the person in the past had in fact engaged—has the Court found an *ex post facto* violation.

Because the SORNA provision at issue in this case falls into the former category, it is constitutional. First, petitioner here had the ability to comply with the SORNA. All he had to do was re-register after the law took effect. He is being prosecuted for that failure, not for moving across state lines prior to the law's effective date. Second, as the court below held, petitioner had a reasonable time to re-register after

the law's effective date. The judgment below should be affirmed.

ARGUMENT

THE SORNA IS NOT AN *EX POST FACTO* LAW

If the United States prevails on the first question presented in this case, then once the SORNA became effective it required petitioner to re-register as a sex offender in Indiana. Importantly, this prosecution against petitioner was not commenced until almost 6 months after the Attorney General promulgated regulations implementing the SORNA and about 13 months after the SORNA was enacted. Indeed, it was not until almost 5 months after the Attorney General's regulations were promulgated that authorities became aware that petitioner was living in Indiana but was registered in Alabama. Thus, at a minimum, petitioner had almost 5 months to comply with the SORNA's re-registration requirement while living in Indiana, but he failed to do so.

The second question presented is whether the SORNA, if interpreted to apply to petitioner and others similarly situated, is an *ex post facto* law. As the States explain below, it is not.

A. The Court's Decision In *Smith v. Doe*, 538 U.S. 84 (2003), Requires Rejection Of Any *Ex Post Facto* Claim Here.

The Court upheld the constitutionality of sex offender registration laws against *ex post facto* challenges in *Smith v. Doe*, 538 U.S. 84 (2003). In *Smith*, the Court upheld an Alaska sex offender

registration law (that was not, in material respects, any different than the laws of the other States), concluding that the statute was both civil (regulatory) and not punitive. Indeed, as the Court pointed out, "[t]he Act does not restrain the activities sex offenders may pursue but leaves them free to change jobs or residences." *Id.* at 100. Further, the Court noted that "an imposition of restrictive measures on sex offenders adjudged to be dangerous is a 'legitimate nonpunitive governmental objective and has been historically so regarded.'" *Id.* at 93 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997)).[**]

Importantly, the Court commented on the very question whether prosecuting a sex offender for failing to register is "punishment" for past conduct (the underlying sexual offense). The Court's emphatic and clear answer was "NO": "A sex offender who fails to comply with the reporting requirements may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding *separate from the individual's original offense*." 538 U.S. at 101-02 (emphasis added).

[**] At least 21 States now have sex offender civil commitment laws, sometimes referred to as "sexually violent predator acts," the type of law at issue in *Kansas v. Hendricks*, 521 U.S. 346, 371 (1997), a case in which the Court upheld the Kansas statute against *ex post facto*, substantive due process, and double jeopardy challenges. Later, in *Seling v. Young*, 531 U.S. 250 (2001), the Court rejected an *ex post facto* challenge to the Washington program, holding that a statute found to be civil on its face cannot be deemed punitive as applied to any particular individual. A federal sex offender civil commitment statute is at issue in the pending case of *United States v. Comstock*, No. 08-1224 (argued January 12, 2010).

Thus, in *Smith*, the Court recognized two fundamental principles that effectively require rejection of petitioner's constitutional *ex post facto* claim in this case. First, sex offender registration laws are by their nature *civil, regulatory* measures designed to protect the public, not to punish the sex offenders who are subject to these laws. Second, failure to register as required by law can be made its own, separate criminal offense—as Congress made it so in the SORNA—without making the law a prohibited *ex post facto* measure.

Thus, as further explained below, it matters not whether a sex offender subject to the SORNA traveled across state lines *before or after* the SORNA took effect. Either way, the legal obligation the SORNA imposed is to *re-register*, an obligation that sprang forth only with the enactment of the SORNA and an obligation which is strictly and solely "prospective" for purposes of *ex post facto* principles.

That clearly would be the result, for example, were Congress to reinstate the military draft for all able-bodied citizens age 45 or less who had never volunteered for military service, even though many of those citizens might well have anticipated and expected that they would never be subject to such a measure and thus made conscious choices in the past never to volunteer for such service. The fact that a new legal obligation springs forth and takes into account in some fashion past conduct does not render a statute an *ex post facto* law. The entire history of the Court's *ex post facto* cases makes that proposition clear, as briefly illustrated below.

B. The SORNA Cannot Be An *Ex Post Facto* Law Because It Punishes Only Conduct That Occurs After The Law's Effective Date.

1. Almost 100 years ago the Court rejected the same *ex post facto* argument the petitioner makes in this case. In *Chicago & Alton RR Co. v. Tranbarger*, 238 U.S. 67 (1915), the Court considered whether it was an *ex post facto* violation for a Missouri statute to impose on railroads a new requirement to construct and maintain "suitable openings across and through the right of way and roadbeds . . . and suitable ditches and drains along each side of the roadbed . . . sufficient [] to drain and carry off the water . . . ." *Id.* at 71. A railroad was fined $100 for failure to comply with the statute and it appealed to the Court, arguing that the Missouri statute was an *ex post facto* law if it was applied to railroads constructed prior to the law's enactment.

The Court had little trouble rejecting the claim, pointedly observing that the railroad's *ex post facto* argument "is sufficiently answered by pointing out that [the railroad] is subjected to a penalty not because of the manner in which it originally constructed its railroad embankment, nor for anything else done or omitted before the passage of the act ..., but because after that time it maintained the embankment in a manner prohibited by the act." 238 U.S. at 73. Noting that the Missouri statute allowed three months after construction of new railroad lines for compliance with the drainage requirement, the Court concluded that the statute was not an *ex post facto* law with regard to pre-existing rail lines so long as the railroad companies were allowed "a reasonable time after the

passage of the enactment within which to construct the openings." *Id.* Thus, the Court concluded that "the statute is of course to be construed as allowing some time—either three months, or a reasonable time more or less than that period—for the[] construction [of openings] by railroads already in existence." *Id.* at 74. The Court, however, declined to decide what would constitute such a "reasonable time" in this case, because the railroad had not raised or argued that question in the courts below.

The analogy to the SORNA provision here is compelling. So long as those subject to the SORNA re-registration provision have a "reasonable time" to comply after the SORNA took effect, whether they traveled across state lines prior to or after the SORNA's enactment (or even were on an airplane flying from one state to another the moment the SORNA took effect) is of no constitutional relevance. As the Court recognized in *Smith v. Doe*, it is the failure to *re-register after the SORNA took effect* that is the offense; the offense is not the act of traveling across state lines.

2. Several other decisions recognize and apply the same fundamental *ex post facto* principles as *Tranbarger*. For example, in *Samuels v. McCurdy*, 267 U.S. 188 (1925), the defendant was prosecuted for unlawful possession of liquor, liquor that he claimed he lawfully possessed before a change in the laws made such possession a crime. In essence, the defendant argued that he simply had failed to dispose of the liquor after the law changed, but he never took any affirmative action to acquire liquor in violation of the law. The Court easily rejected the claim, observing that the statute was not an *ex post facto* law because

the "penalty it imposes is for *continuing to possess* the liquor after the enactment of the law. It is quite the same question as that presented in *Chicago & Alton R. Co. v. Tranbarger* . . . ." 267 U.S. at 193 (emphasis added).

Similarly, the Court has upheld laws changing the requirements for medical licenses and punishing non-compliance with the new rules, even for those who held a valid license under prior rules. In *Reetz v. Michigan*, 188 U.S. 505 (1903), the Court held that *ex post facto* principles did not bar the prosecution of a man who, although he had been practicing medicine lawfully for many years, failed to comply with new regulations that required proof of graduation from an established and reputable medical school in order to hold a valid medical license in Michigan. The Court held that the statute was not an *ex post facto* law because it "does not attempt to punish him for any past offense, and in the most extreme view can only be considered as requiring continuing evidence of his qualifications as a physician or surgeon." *Id.* at 510. To same effect, see *Dent v. West Virginia*, 129 U.S. 114 (1889) (upholding validity of West Virginia law increasing requirements for medical licenses as applied to a person who had been practicing medicine lawfully for many years prior to the new law.)

Likewise, the Court upheld a law depriving those who currently supported or practiced bigamy or polygamy of their right to vote. In *Murphy v. Pratt*, 114 U.S. 15 (1885), the Court held that disenfranchising anyone who currently practiced bigamy or polygamy at the time they sought to register to vote did not violate *ex post facto* principles: "disenfranchisement operates upon the existing state

and condition of the person, and not upon a past offense. It is, therefore, not retrospective. He alone is deprived of his vote who, when he offers to register, is then in the state and condition of a bigamist or polygamist." *Id.* at 43. In other words, because anyone practicing bigamy or polygamy could gain the right to vote by taking the necessary steps to end his unlawful conduct, the law at issue had no unconstitutional "retrospective" effect.

Indeed, this is the critical distinction between this line of cases and the infamous "oath" cases, several of which arose in the aftermath of the Civil War. In the oath cases, Congress and some states imposed as a condition of exercising certain aspects of citizenship (*e.g.*, admission to the bar of this Court, holding office, voting, pursuing various professions) a requirement that citizens swear, for example, that they had never supported or sympathized with the Confederacy. Obviously, for anyone who had supported or sympathized with the Confederacy during the Civil War, such an oath simply could not be taken, at least not honestly, and thus the effect was to disqualify such individuals absolutely and forever from holding the relevant offices or pursuing the professions at issue. In several cases, the Court (and other courts) struck down such "oath" requirements as *ex post facto* laws. *See, e.g.*, *Ex parte Garland*, 71 U.S. 333 (1867) (striking down an Act of Congress that prohibited any lawyer from being admitted to the bar of this Court without first taking such an oath); *Cummings v. Missouri*, 71 U.S. 277 (1867) (striking down Missouri law used to bar a Roman Catholic priest from holding his religious position unless and until he took such oath); *Pierce v. Carskadon*, 83 U.S. 234 (1873) (striking down a West Virginia law that prohibited setting aside

a default judgment unless the movant first took such an oath). *Cf. In the matter of Dorsey*, 7 Porter 293 (Ala. 1838) (striking down a law prohibiting admission to the bar of any man who did not take an oath that he had never engaged in any duel).

The thrust of these cases is that so long as a new rule of law applies to a current condition (1) over which the regulated person has actual control (such as the ability to create drainage openings in railroad beds, the ability to dispose of a prohibited substance in one's possession, the ability to obtain required medical credentials, the ability to cease engaging in polygamy, or the ability to re-register as a convicted sex offender in a new state to which one has moved), and (2) there is a "reasonable time" for the regulated person to comply with the law, there is no *ex post facto* violation.

3. Modern decisions in the state courts and the federal circuits have recognized the continuing validity of these fundamental *ex post facto* principles. For example, in *Wright v. Superior Court*, 15 Cal. 4th 521 (1997), the California Supreme Court held that it was not an *ex post facto* violation to apply a felony non-registration provision to a sex offender whose initial failure to register occurred while a prior version of the law was in effect, a version under which failure to register was a misdemeanor. Relying on this Court's decisions in *Tranbarger* and *Samuels*, the California Supreme Court held that the *ex post facto* prohibition "does not encompass offenses for which the defendant is prosecuted or punished based on acts continuing beyond a change in the law." *Id.* at 531. Because the offender in that case had a duty to re-register, and he failed to do so even after the statutory amendment

made failure to do so a felony, he could be prosecuted for a felony.

In *United States v. Trupin*, 117 F.3d 678 (2d Cir. 1997), the defendant obtained a stolen painting in 1978 and moved it across state lines in 1980, but he was prosecuted under a version of 18 U.S.C. § 2315, which had been enacted in 1986 to include among its prohibitions the receiving, possessing, concealing, storing, bartering, selling or disposing of any stolen goods that have a value of $5,000 or more and which have moved across state lines. Defendant argued that the 1986 version of the statute could not be applied to him, because he moved the painting across state lines in 1980, several years before § 2315 was broadened, but the Second Circuit rejected his *ex post facto* argument: "the relevant conduct in this case was not the receipt of the painting which [the defendant took across state lines] in 1980, but the continued possession of it after the 1986 amendment. [The defendant] could have avoided conviction for possession by ceasing his possession *within a reasonable time after* the 1986 amendment." 117 F.3d at 686 (emphasis added; citing *Tranbarger*); *see also United States v. De La Mata*, 266 F.3d 1275, 1292 (11th Cir. 2001) ("it is well settled that Congress may pass new laws which require us to alter our conduct or risk prosecution", holding that the defendants were properly convicted of money laundering offenses, even though they entered the offending leases before such activity was made criminal by federal law, because the defendants' conduct continued after enactment of the new statute; citing *Samuels* and *Tranbarger*).

From a constitutional perspective, it makes no difference that some sex offenders subject to the

SORNA's criminal penalties for failure to re-register after moving across state lines completed their travel prior to the SORNA's effective date. The SORNA does not punish such sex offenders for traveling interstate; it punishes their failure to *re-register* as required by the civil regulatory scheme. *Smith v. Doe*, 538 U.S. at 101-02 ("A sex offender who fails to comply with the reporting requirements may be subjected to a criminal prosecution for that failure, but any prosecution is a proceeding separate from the individual's original offense.") So long as the offenders have had a reasonable time to comply with the SORNA requirement after the law took effect, there is no *ex post facto* violation.

CONCLUSION

The SORNA is not an *ex post facto* law.

Respectfully submitted,

Steve Six
Attorney General of Kansas
STEPHEN R. MCALLISTER
Solicitor General of Kansas
Counsel of Record
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
120 S.W. 10th Street, 2nd Floor
Topeka, KS 66612
(785) 296-2215

JANUARY 2010

AMICUS CURIAE BRIEF

148

Supreme Court, U.S.
FILED
DEC 10 2009
OFFICE OF THE CLERK

(6)

Nos. 08-1301

In the Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

COREY RAYBURN YUNG
John Marshall Law School
315 S. Plymouth Ct.
Chicago, IL 60604
(312) 386-2863

AMY L. NEUHARDT
Counsel of Record
Boies, Schiller & Flexner LLP
5301 Wisconsin Avenue, NW
Washington, DC 20015
(202) 274-1137

Counsel for Amici Curiae
(additional counsel listed inside cover)

BOTH SAIEEH

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DOUGLAS A. BERMAN
The Ohio State University
Michael E. Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

WAYNE A. LOGAN
Florida State University College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
(850) 644-4759

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INTEREST OF THE *AMICI CURIAE*

Amici curiae are law professors who specialize in constitutional law, substantive criminal law, and criminal procedure.[1] As law professors, *amici* have a particular interest in ensuring that the Ex Post Facto Clause of Article I of the United States Constitution is enforced in a manner consistent with its core historic goals and principles. The judgment of the U.S. Court of Appeals for the Seventh Circuit violated these goals and principles, and it prescribed a peculiar new test for application of the Clause that significantly deviates from this Court's settled jurisprudence.

SUMMARY OF ARGUMENT

In this brief, *amici* explore the critical structural role of the Ex Post Facto Clause, set forth in Article I of the United States Constitution, as applied to the prosecution of Thomas Carr. Since the nation's founding, the Clause has guarded against retrospective criminal legislation targeting unpopular individuals. The prosecution of Carr, a convicted sex offender, is emblematic of the situation feared by the Framers, which is why the Clause was placed in the body of the Constitution itself. The Seventh Circuit,

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[1] *Amici*'s names and law school affiliations are listed in the Appendix to this brief. No person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties has received timely notice of the intent to file this brief and consented to its filing. *Amici*'s affiliations are listed for identification purposes. The views expressed herein are those of the *amici* and not the institutions with which they are affiliated.

in addition to disregarding the core purposes of the Clause, adopted a new test, allowing for prosecution of an individual based on behavior occurring before enactment of the criminal law in question. The Court should reverse the erroneous judgment of the Seventh Circuit and restore the firewall wisely embedded by the Framers in the Constitution against retroactive criminal legislation.

ARGUMENT

I. THOMAS CARR'S PROSECUTION UNDER 18 U.S.C. § 2250(a) IMPLICATES THE CORE PURPOSES OF THE EX POST FACTO CLAUSE

The Ex Post Facto Clause was included in the United States Constitution to prevent the types of prosecutions that are now occurring under 18 U.S.C. § 2250(a) based on pre-enactment events. Article I, section 9, clause 3 of the Constitution unequivocally proclaims that no "ex post facto law shall be passed." The Framers' decision to ensconce the Clause in the body of the Constitution reflected their profound concern for the threat to human liberty posed by retroactive criminal laws. *See, e.g.*, THE FEDERALIST, No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("The establishment of the writ of habeas corpus, the prohibition of ex post facto laws, and Titles of Nobility ... are perhaps greater securities to liberty and republicanism than any [the Constitution] contains."); *id.*, No. 44, at 282 (James Madison) (proclaiming that "ex post facto laws...are con-

trary to the first principles of the social compact, and to every principle of sound legislation.").[2]

The Ex Post Facto Clause was first interpreted by the Supreme Court in *Calder v. Bull*, 3 U.S. 386 (1798), a decision that continues to control the interpretation of the Clause to this day. *See Stogner v. California*, 539 U.S. 607, 611 (2003) (referring to the rubric used in *Calder* as "a categorization that this Court has recognized as providing an authoritative account of the scope of the Ex Post Facto Clause."); *Collins v. Youngblood*, 497 U.S. 37, 42, (1990) (referring to the *Calder* categories as "an exclusive definition of ex post facto laws...") (emphasis removed). In *Calder*, Justice Chase identified the four categories of impermissible legislative action under the Clause:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the

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[2] For a more thorough discussion of the history and animating purposes of the Clause, *see* Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 AM. CRIM. L. REV. 1261, 1275-80 (1998).

> time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. at 388, 390. After *Calder*, this Court has maintained a commitment to the principle that retroactive punishment is constitutionally unacceptable, even for despised members of the public whom legislative majorities may be eager to subject to new criminal laws.

Notably, in *Cummings v. Missouri*, 71 U.S. 277 (1866), the Court reviewed a portion of the Missouri Constitution approved in the wake of the Civil War, which contained a "test oath" designed to ensure Union loyalty. *Id.* at 316. The provision provided that any person who refused to take the oath could not hold "any office of honor, trust, or profit." *Id.* at 317. The Court in *Cummings* held that the loyalty oath was inconsistent with the Ex Post Facto Clause because the oath violated the prohibition against punishing behaviors not punishable at the time of commission; enhanced the punishment of behaviors already criminal at the time of their commission; and subverted the "presumptions of innocence," by altering the rules of evidence. *Id.* at 327-28.

More recently, in *Carmell v. Texas*, 529 U.S. 513 (2000), the Court confirmed the continued vitality of *Calder* and the critical importance of the Ex Post Facto Clause. In its opinion, the Court noted that the Clause prohibits the government from "altering [the rules] in a way that is advantageous only to the State, to facilitate an easier conviction." *Id.* at 533. The Court proclaimed that the Ex Post Facto Clause is needed to guarantee "fundamental justice" and to

protect the public from "manifestly unjust and oppressive" laws. *Id.* at 531-32.

Through its numerous Ex Post Facto Clause cases, this Court has identified three major purposes of the Clause: 1) preventing the legislature from enacting in "arbitrary and potentially vindictive legislation"; 2) preserving the separation of powers wherein the legislature regulates prospective actions and the judiciary rules in regard to actions already done; and 3) providing fair notice to the members of the general public that their actions are criminal. *See, e.g., Weaver v. Graham*, 450 U.S. 24, 28-29 (1981).

Chief Justice Marshall noted that a core rationale of the Ex Post Facto Clause was to prevent a legislature from enacting retroactive punishments when it was caught up in the "feelings of the moment" and subject to "sudden and strong passions" toward a particular population. *Fletcher v. Peck*, 10 U.S. 87, 137-38 (1810). This Court in *Cummings* recognized that the public's outcry for weeding out Confederate sympathizers was no justification for abridging one of the most important protections of liberty in the Constitution. *Cummings*, 71 U.S. at 316-17. If the Ex Post Facto Clause is subject to the whims of a fervent public targeting an unpopular or powerless population, it would cease to act, in James Madison's words, as a "constitutional bulwark" against instances of impassioned legislative overreach. *See* THE FEDERALIST, *supra*.

The case of sex offenders, like the Confederate sympathizers in *Cummings*, is an instance where the legislative branch has targeted a disdained segment of the population with a variety of innovative pun-

ishments and regulations. *See* Wayne A. Logan, KNOWLEDGE AS POWER: CRIMINAL REGISTRATION AND COMMUNITY NOTIFICATION LAWS IN AMERICA, 85-108 (2009). In this case, the innovation has gone too far by reaching back in time to punish persons for non-criminal conduct that was completed before the passage of the relevant law. The "hydraulic pressures," *Payne v. Tennessee*, 501 U.S. 808, 867 (1991) (Stevens, J., dissenting), that periodically beset our majoritarian political processes that compel lawmakers to impose retroactive punishments on maligned groups "of the moment." *Fletcher*, 10 U.S. at 87. Thus, this Court should not allow the disdain for sex offenders to undermine the Ex Post Facto Clause, one of America's most significant protections of liberty against ill-intentioned or impassioned legislators.

II. SECTION 2250(A) IS A PUNITIVE PROHIBITION THAT RESTROSPECTIVELY DISADVANTAGES INDIVIDUALS SUCH AS THOMAS CARR

A. Section 2250(a) is Punitive in Purpose and Effect

Because the Ex Post Facto Clause solely regulates criminal legislation, a reviewing court must assess whether the statute in question is punitive in purpose or effect. *Smith v. Doe*, 538 U.S. 84, 92 (2003). Although the Seventh Circuit did not squarely address this threshold requirement, numerous lower courts have, and reached an incorrect result. Notwithstanding that section 18 U.S.C. § 2250(a) is reposed in the federal criminal code, and authorizes a penalty of up to ten years in prison, several lower

federal courts have wrongly concluded that the provision is not punitive in intent, citing *Smith* in support. *See, e.g., United States v. Hinen*, 487 F. Supp. 2d 747, 755 (W.D. Va. 2007) ("The contours of the statutory scheme at issue in Smith are nearly indistinguishable from the one at issue here."); *United States v. Samuels*, 543 F. Supp. 2d 669, 676 (E.D. Ky. 2008); *see also* Corey Rayburn Yung, *One of These Laws is Not Like the Others: Why the Federal Sex Offender Registration and Notification Act Raises New Constitutional Questions*, 46 HARV. J. ON LEGIS. 369, 387-92 (2009) (citing decisions).

This Court's decision in *Smith* in no way supports such a conclusion. The *Smith* court simply did not address the criminal prosecution of a defendant – that case was wholly focused on a civil challenge to the public registry listing itself, answering whether application to previously convicted individuals was punitive.

Moreover, actual application of the intent-effects test used by the Court to discern punishment dictates the conclusion that 18 U.S.C. § 2250(a) is punitive in nature. As this Court has explained, "[w]hether a statutory scheme is civil or criminal 'is first of all a question of statutory construction.'" 538 U.S. at 92 (quoting *Kansas v. Hendricks*, 521 U.S. 346, 361 (1997)). In *Smith*, the Court noted that the placement of the Alaska requirement in the civil code was indicative of the legislature's non-punitive intent. *Smith*, 538 U.S. at 94. Here, Congress plainly and purposely situated the crime of failure to register in the federal criminal code.

The lower courts that have found prosecutions under 18 U.S.C. § 2250(a) to be non-punitive have stressed that the legislative intent language contained in SORNA is the same as in the Alaska statute at issue in *Smith*. *See, e.g.*, *Hinen*, 87 F. Supp. 2d at 755. However, the language is simply a reference to guaranteeing public safety. *See* 42 U.S.C.A. § 16901. Such broad language cannot trump the SORNA's placement in the criminal code as well as the severe prison penalties Congress attached to 18 U.S.C. § 2250(a): a significant fine and up to ten years in federal prison. Furthermore, the broad language Congress used concerning public safety is not referenced specifically to the provisions of 18 U.S.C. § 2250(a), but rather to SORNA as a whole, which contains numerous civil and criminal provisions.

Even assuming a lack of legislative punitive purpose, 18 U.S.C. § 2250(a) plainly has punitive effect. To determine if a law is punitive in its effects, this Court has used the seven factor test outlined in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168–69 (1963). The *Mendoza-Martinez* factors are "neither exhaustive nor dispositive," but are a useful means of determining whether the effects of a statute are punitive. *Smith*, 538 U.S. at 97. In *Smith*, this Court only found five of the factors to be relevant when analyzing the effect of a sex offender registry listing:

> [I]n its necessary operation, the regulatory scheme: has been regarded in our history and traditions as a punishment; imposes an affirmative disability or restraint; promotes the traditional aims of punishment; has a rational connection

> to a nonpunitive purpose; or is excessive with respect to this purpose.

Id. Unlike in *Smith*, each of those factors as applied in this setting points strongly toward a conclusion that SORNA is punitive in its effects.

In *Smith*, this Court found that mere registration listings and notifications were not historically regarded as punishment, *id.*; here, the law at issue is a criminal prohibition and punishment for failing to register and it includes a substantial prison penalty (which is assuredly a historical form of punishment). In *Smith*, this Court noted that the lower court had factually erred in finding that the statute had numerous reporting requirements which would have constituted definitive affirmative disabilities and restraints. *Id.* at 101. In the case of SORNA, the personal appearance requirements are frequent and of the type that this Court identified in *Smith* as constituting such restraints. *See, e.g.*, 42 U.S.C. § 16916(3) (requiring Tier III offenders to appear in person at least four times per year for a lifetime). In addition, the prison penalties surely constitute such disabilities and restraints as well. As to the "traditional aims of punishment factor," the prison penalties, again, fit with the goals of retribution, incapacitation, and deterrence (specific and general).

This Court has held that the connection to a nonpunitive purpose is the most important of the *Mendoza-Martinez* factors. *Smith*, 538 U.S. at 102-03. However, insofar as the only non-punitive purpose that has been identified is public safety, SORNA is not situated any differently than any other criminal law. The last factor that the Court considered in

Smith was whether the statute was excessive in regards to those non-punitive purposes. *Id.* Because sex offenders are a diverse population, *see* Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. CR-CL LAW REV. (forthcoming 2010), available at: http://ssrn.com/abstract =1456042, many persons prosecuted for failing to register are eligible to receive prison sentences far in excess of that available for their original sex offense. This makes the penalty disproportionate to the speculative goal of preventing recidivism.[3]

Also of significance is one *Mendoza-Martinez* factor that the Court did not consider in *Smith*: that the conduct in question was already defined as criminal. *United States v. Ward*, 448 U.S. 242, 249–50 (1980). In the case of sex offender registration, every jurisdiction in the United States has a registration law with criminal penalties giving strong evidence of punitive effects. *Smith*, 538 U.S. at 90. As a result, if the Court reaches this stage of the analysis, it should find that, unlike the registry listing in *Smith*, the punitive effects of SORNA are so punitive as to override even a finding of non-punitive intent.

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[3] This Court should be sure to avoid undue reliance on questionable recidivism statistics in its balancing test, especially given that a Department of Justice study of the 9,691 sex offenders released in fifteen states since 1994 found that sex offender recidivism was only 5.3% in the critical window of three years after release. Lawrence A. Greenfeld, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994 (2003). This study documents that, contrary to folk wisdom, sex offender recidivism is in fact significantly lower than recidivism for many other groups of criminal offenders.

Ultimately, there should be little doubt that a statute placed in the criminal code that authorizes a substantial fine and ten-year prison sentence as punishment is, in fact, intended to be punitive. However, even if this Court concludes that the statute was not punitive in intent, the effects of 18 U.S.C. § 2250(a) are so punitive as to overwhelm any ascribed non-punitive intent.

B. The Application of Section 2250 to Carr was Retrospective

As this Court has made clear, only retrospective laws come within the ambit of the Ex Post Facto Clause. *Weaver*, 450 U.S. at 29. It is this aspect of the Seventh Circuit's decision below that presents greatest cause for jurisprudential concern. According to the ruling below, "as long as at least one of the acts" specified by Congress as triggering criminal liability took place after the enactment of 18 U.S.C. § 2250(a), "the clause does not apply." *United States v. Dixon*, 551 F.3d 578, 585 (7th Cir. 2008). The court elaborated that "[s]ince [Carr's] violation was not complete when the Act became applicable to him, his rights under the ex post facto clause were not violated." *Id.* at 587.

According to the approach adopted by the Seventh Circuit, as long as any conduct required by the statute (even an omission) occurred after the enactment of the criminal law, then there can be no Ex Post Facto Clause challenge. This interpretation of the Ex Post Facto Clause, if adopted by the Court, would become the exception that swallows the rule and would allow legislatures to render the Clause a constitutional nullity.

In support of its unusual interpretation of the Ex Post Facto Clause, the Seventh Circuit cited to circuit opinions that are simply inapplicable. In *United States v. Campanale*, 518 F.2d 352 (9th Cir. 1975), the Ninth Circuit Court of Appeals rejected an Ex Post Facto challenge against a conviction for conspiracy to conduct a pattern of racketeering activity in violation of 18 U.S.C. § 1962(d). *Id.* at 355. In that case, the government established a pattern of extortion by the defendant that spanned the period before and after the enactment of the relevant statute. Because the conduct of the defendants established a pattern, the conduct before the law was enacted was relevant as to the acts after the passage of the law. *Id.* at 364-65. Unlike the present matter, however, the acts at issue in *Campanale* before and after the enactment of the law were pertinent to the *same* element of the new law. *Id.* at 365. There was no basis for the Seventh Circuit's far-reaching and potentially limitless one-act-under-any-element rule. In Carr's case, unlike *Campanale*, one essential element of the crime, travel in interstate commerce, consisted of conduct that was completed before the passage of SORNA. Further, there was no element of 18 U.S.C. § 2250(a) that required a showing of a pattern by the defendant which might have necessitated the consideration of conduct before and after the passage of a law. The Seventh Circuit also cited *United States v. Brown*, 555 F.2d 407, 416-17 (5th Cir. 1977), which is inapplicable for the same reasons as *Campanale*. Instead of the Seventh Circuit's unprecedented and problematic approach, a simpler version consistent with prior case law would simply

be that: *one act for each element must be completed after the enactment of a statute.*[4]

The Seventh Circuit also cited to a body of cases concerning instances when greater punishment was applied for a new crime based upon the commission of a prior crime. *See, e.g., McDonald v. Massachusetts*, 180 U.S. 311 (1901). In those instances, however, the Court found that the prior conduct was not used as the basis for an element in the new crime – it was simply an enhancement to sentencing. *Id.* at 312-13. Such cases, therefore, are not analogous to the present case.

The only possible way the Seventh Circuit could reconcile its holding with prior case law was if 18 U.S.C. § 2250(a) was construed as a continuing offense analogous to conspiracy.[5] This argument fails

---

[4] There are other settings in which no Ex Post Facto Clause violation was found even though a defendant's conviction was based in part upon prior conduct. However, such cases have concerned instances when the prior conduct served as the basis for a duty by the defendant in a new crime. For example, in the case of felons in possession of firearms, *see, e.g., United States v. Mitchell*, 209 F.3d 319, 322–23 (4th Cir. 2000), the past conduct was not actually an element of the crime. Rather, the past conduct supported a conviction that was the basis for a duty to avoid possessing a firearm. However, in this matter, unlike the felon in possession case, an additional element, interstate travel, was completed before the passage of the law in question.

[5] Notably, the Government, in its opposition to the grant of a writ of certiorari, contended that the Seventh Circuit did not find that the failure to register under 18 U.S.C. § 2250 was a continuing offense. Opp. Brief, p. 19 ("At any rate, the court of appeals did not rest its ex post facto analysis on a finding that petitioner's violation of SORNA began before, but then continued until after, the date on which the statute took effect with

because the conspiracy cases cited by the lower court did not allow prosecutions for instances when all of the conduct related to one element occurred prior to the enactment of the relevant law. *See, e.g., Campanale*, 518 F.2d at 355.

Further, the continuing offense characterization of the failure to register is wrong as a matter of law. This Court has made clear that "[continuing] offenses are not to be implied except in limited circumstances." *United States v. Toussie*, 397 U.S. 112, 121 (1970). The Seventh Circuit failed to cite any legislative support or special circumstances for a finding that 18 U.S.C. § 2250(a) includes a continuing offense element. In *Toussie*, this Court instructed that courts should not identify an element of a crime as being continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* at 115. As the facts of *Toussie* concerned the registration for the military draft, the Court's reasoning is directly applicable to the present matter: "There is ... nothing inherent in the act of registration itself which makes failure to do so a continuing crime." *Id.* at 122.

Notably, the lower court only considered the purpose of providing fair notice to the defendant, which is only one of three recognized purposes of the Ex Post Facto Clause. *Dixon*, 551 F.3d at 584-87. In-

respect to him."). But the Seventh Circuit's opinion suggests that the continuing offense rationale is the basis for its holding. *Dixon*, 551 F.3d at 582 ("The Act creates a continuing offense in the sense of an offense that can be committed over a length of time.").

deed, the court found, without any discussion of prior case, that:

> Carr's ... interstate travel ... preceded the application of the Sex Offender Registration and Notification Act to him... [T]he only ground of his appeal is that his conviction violated the ex post facto clause. But he does not and cannot complain that he was not given enough time to register in Indiana in order to avoid violating the Act, because he admits that he had still failed to do so "on or about July, 2007," almost five months after the Attorney General's regulation was issued that made the statute applicable to him. Five months is a sufficient grace period.... Since his violation was not complete when the Act became applicable to him, his rights under the ex post facto clause were not violated.

Id. at 586-87. As this Court recently emphasized, however, the Ex Post Facto Clause was primarily designed to ensure governmental restraint, independent of notice and reliance concerns:

> [T]here is plainly a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his life or liberty.

Carmell v. Texas, 529 U.S. 531, 533 (2000).

Also of significance, the ruling of the Seventh Circuit is directly at odds with law derived from the *Calder* categories. The first *Calder* category, that "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 U.S. at 390-91, is certainly relevant to the present matter. The second *Calder* category, that "Every law that aggravates a crime, or makes it greater than it was, when committed," *id.*, is also applicable. In the case of SORNA as applied to Carr, it criminalized, at the federal level, travel in interstate commerce prior to the enactment of SORNA as an essential element of Carr's criminal conduct and increased the punishment of a state law or pre-existing federal law failure to register by applying federal punishment to that prior violation.

The Seventh Circuit's analysis would make possible a broad and potentially limitless range of options for legislatures seeking to adopt retrospective laws without running afoul of the Constitution. If Congress desired to apply federal penalties for crimes that occurred at the state level for decades previous, it could meet the Seventh Circuit's test without much trouble. This hypothetical statute, for example, would easily allow prosecution of persons at the federal level with previous convictions for fraud:

> (a) In General. – Whoever –
>
> > (1) is subject to the requirements of the Pervasive Fraud Act [including all persons who had been convicted of any fraud crime]; and

> (2) knowingly travels in interstate commerce;
>
> shall be fined under this title or imprisoned not more than 8 years, or both.

The aforementioned statute would meet the Seventh Circuit's test because, as that court noted, a person "by not committing that act (provided of course that it is a voluntary act and so can be avoided by an exercise of volition) he [or she] would have avoided violating the new law." *Dixon*, 551 F.3d at 585. So, a defendant could avoid criminal prosecution by avoiding travel in interstate commerce after the enactment of the hypothetical Pervasive Fraud Act. However, if a person subject to the Pervasive Fraud Act briefly crossed state lines years after the commission of the qualifying offense, he or she would be subject to substantial prison penalties and, if the Seventh Circuit's reasoning was utilized, have no recourse under the Ex Post Facto Clause. While it might seem farfetched to believe that such a statute would be passed or enforced in that manner, a recent SORNA case that was before the Eleventh Circuit Court of Appeals illustrates that such a situation is very real.

In *United States v. Ambert*, Gene Felix Ambert, on July 6, 2007, had a warrant issued for his arrest for violation of Florida registration law. 561 F.3d 1202, 1205 (11th Cir. 2009). On July 9, 2007, Ambert took a brief trip to California and returned to Florida two days later. *Id.* He did not trigger any new obligation to change his registration status based upon that brief trip. Nonetheless, that three-day excursion, which was wholly unrelated to Ambert's failure

to register, served as the sole basis for alleged travel in interstate commerce needed to support his indictment under § 2250(a). *Id.* at 1207. Because that interstate travel occurred after the enactment of SORNA, the Eleventh Circuit cited Ambert's travelling between Florida and California as a basis for rejecting his Ex Post Facto Clause argument since the travel occurred after the passage of the Act. *Id.* at 1208 ("[Ambert] performed every action necessary for prosecution – i.e., ... traveling in interstate travel – after the effective date of the Attorney General's retroactivity determination. The application of SORNA to these facts does not violate the ex post facto clause.").

In that sense, *Ambert* seems to be the reverse of the present case since the travel clearly occurred after the passage of SORNA. However, the *Ambert* facts illustrate that the federal government, under the Seventh Circuit's ruling, would be free to punish conduct before the passage of a law if it simply attached a jurisdictional element that required conduct after the enactment of that statute. By holding that the travel was wholly separate element of conduct that need not be tied to a failure to register,[6]

---

[6] Indeed, this is why the Commerce Clause claim of Carr was also mishandled by the Seventh Circuit. Although not before this Court, the Commerce Clause and Ex Post Facto Clause issues are often intertwined because both arguments focus on the relationship between the interstate travel element and the failure to register element. The Seventh Circuit disposed of the argument that the government lacked the jurisdiction for the prosecution of Carr under the Commerce Clause in a single sentence by stating that, "Dixon's lawyer must in the heat of argument have forgotten the Mann Act, 18 U.S.C. §§ 2421 et seq." *Dixon*, 551 F.3d at 583. The Mann Act is clearly distin-

the *Ambert* court, and other courts that have reached similar conclusions, have made the impact of the Seventh Circuit holding in this matter even more significant. Indeed, under the Seventh Circuit's reasoning, the Alaska legislature could have made the Ex Post Facto issue much easier for the Court in *Smith v. Doe* if it had simply included an element for listing based upon a defendant's inter-county travel (or some other action by the defendant). Then, the law would have ceased to be retrospective. This renders the Ex Post Facto Clause meaningless in the face of any legislature determined to impose retrospective criminal legislation.

Similarly, if Congress or a state legislature wanted to punish *unprosecuted* thefts from previous decades, it could pass this statute:

> (a) In General. – Whoever –
>
> > (1) is subject to the requirements of the Property Crime Amnesty Act [including all persons who have committed property theft which had a nexus with interstates commerce,

---

guishable, however, because it "criminalizes action in the course of traveling across state lines.... Thus, there is no strong connection with interstate travel under SORNA as there is under the Mann Act." Yung – *New Questions*, *supra* at 516. Further, "the Mann Act applies to persons who have the requisite intent to commit prostitution by crossing state lines. The travel is part of the *mens rea* of the criminal act. For SORNA, the offender's travel is wholly unrelated to the mental state needed to fail to register." *Id.* at 516-17. The facts of the *Ambert* case, discussed above, also illustrate that the disconnection between the interstate travel element and the failure to register element puts the jurisdictional basis for SORNA in such cases on shaky ground.

> but were never punished for their criminal conduct]; and
>
> (2) knowingly fails to report their unpunished prior crimes;
>
> shall be fined under this title or imprisoned not more than 5 years, or both.

Such a law, perhaps passed under the guise of providing amnesty and absolution for those with guilty consciences, would force persons to confess prior misdeeds for which they were never punished by the state or face criminal penalties for a failure to report such misdeeds. Persons subject to the Act would confront the difficult situation of confessing crimes and facing public ridicule and embarrassment or exposing themselves to criminal liability (assuming they were even aware of the statute). The result for many persons would be to punish them for acts for which the statute of limitations had run. As the Court noted in *Stogner*, 539 U.S. at 611, the revival of prosecution beyond the statute of limitations by legislative act is inconsistent with the Ex Post Facto Clause. *Id.* at 616. Nonetheless, the above statute would surely meet the Seventh Circuit's one-act test because the failure to report the old unprosecuted crime would have occurred after the passage of the law.

In the alternative, assuming that this Court adopts the Seventh Circuit's one-act-under-any-element rule or crafts a similar rule, the Court should still find for the petitioner because the nature of the post-SORNA conduct alleged. In this case, the only conduct that allegedly occurred after the en-

actment of SORNA was an act by omission, the failure to register. Statutes punishing acts of omission are rarities in American criminal law, in part, because such statutes essentially punish a defendant for doing nothing. *See* A.D. Woozley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273, 1293-99 (1983); Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 611 (2001) ("... [L]iability for any kind of omission or failure to act is exceptional."). In the case of Carr, he neither committed a sex offense after the enactment of SORNA nor travelled in interstate commerce. He simply did nothing. Further, unlike instances such a felon in possession of a firearm, a sex offender is unable to shed the registration requirements like the felon can dispose of the illegal weapon. Yung – *New Questions*, *supra*, at 390. To allow that failure to act alone to be the basis for finding that SORNA, as applied to Carr, was not retrospective is inconsistent with the purposes of the Ex Post Facto Clause described above and basic Constitutional fairness. *Hodel v. Irving*, 481 U.S. 704, 733 n.18 (1987) (Stevens, J., concurring). It would also create an easy loophole for legislatures to exploit in punishing past deeds.

C. Thomas Carr Was Disdvantaged By Retrospective Application of 18 U.S.C. § 2250

Finally, application of the Clause also requires that an individual be newly disadvantaged by application of the challenged law, based on the categories identified by the *Calder* Court. Here, such disadvantage arises in two forms.

The first *Calder* category, that "[e]very law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action." *Calder*, 3 U.S. at 390-91, is certainly implicated. Further, the second *Calder* category, that "Every law that aggravates a crime, or makes it greater than it was, when committed," *id.*, is also applicable.

In the case of SORNA as applied to Carr, it criminalized, at the federal level, travel in interstate commerce prior to the enactment of SORNA as an essential element of Carr's criminal conduct and increased the punishment of a state law or pre-existing federal law failure to register by applying federal punishment to that prior violation. Thomas Carr's interstate travel, which was a necessary element of his alleged crime, was alleged to have occurred sometime in 2004 or 2005, well before the enactment of the Sex Offender Registration and Notification Act ("SORNA"), Pub. L. No. 109-248 tit. I, 120 Stat. 590-611 (2006) (codified at 18 U.S.C. § 2250 and scattered sections of 42 U.S.C.), signed into law on July 26, 2006. SORNA required sex offenders to register and maintain their registration status in each jurisdiction where they lived, worked, or attended school. 42 U.S.C. § 16913(a). If a sex offender failed to register or maintain accurate registration information in any of those jurisdictions, the result would be a violation of a new crime established in SORNA, "Failure to register." 18 U.S.C. § 2250(a). Section 18 U.S.C. § 2250(a), as is relevant to this matter, provided that:

> (a) In General. – Whoever –

> (1) is required to register under the Sex Offender Registration and Notification Act;
>
> (2) ... (B) travels in interstate or foreign commerce...; and
>
> (3) knowingly fails to register or update a registration as required by the Sex Offender Registration and Notification Act;
>
> shall be fined under this title or imprisoned not more than 10 years, or both.

There were two elements of conduct embodied in the crime as applied to Carr:[7] traveling in interstate commerce (specified in (a)(2)(B)); and the failure to register (specified in (a)(3)) with a corresponding duty to register (specified in (a)(1)). The Seventh Circuit held that the Act was consistent with the Ex Post Facto Clause even though all of the conduct under one element, travel in interstate commerce, was completed before the enactment of SORNA because the acts in the other element, failure to register, were in part completed after the enactment of SOR-

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[7] Textually, it appears as though there are three elements. However, 18 U.S.C. § 2250(a)(1) is best read as the corresponding duty for the act by omission of failing to register embodied in 18 U.S.C. § 2250(a)(3). It is long settled in American criminal law that for an act by omission to create criminal culpability, there must be a corresponding duty. *See* Graham Hughes, *Criminal Omissions*, 67 YALE L.J. 590, 624 (1958). Consequently, the only possible location for the duty (since sex offender registration is not based upon any common law duty) is 18 U.S.C. § 2250(a)(1).

NA. *United States v. Dixon*, 551 F.3d 578 (7th Cir. 2008).

Initially, it was unclear as to whether the requirements of SORNA would apply to those who had committed sex offenses before the law went into effect. However, pursuant to delegated authority under 42 U.S.C. § 16913(d), the Attorney General on February 27, 2007 declared that the crime of failure to register could be charged against those who had committed sex offenses before the passage of the Act. 72 Fed. Reg. 8896, 28 C.F.R. § 72.3. Consequently, those sex offenders who had committed sex offenses even decades before the enactment of SORNA were required to register and maintain their registry information or face potential prosecution under 18 U.S.C. § 2250(a).

Exactly what constituted a failure to register was still ambiguous after the Attorney General's directive was issued because of the varying registration systems that were in effect at the time. SORNA mandated that each state assist in the creation of a national sex offender registry or lose federal funds. 42 U.S.C. § 16925(a). However, at the deadline for states to comply with the requirements necessary to form the national registry in July of 2009, not one state had met them. *See Leahy Urges Attorney General to Extend Deadline for State Compliance with Sex Offender Registry Act*, STATES NEWS SERVICE, Mar. 19, 2009 ("The deadline for compliance is July 2009, and no state or jurisdiction has yet met the requirements mandated in SORNA."). Consequently, the deadline was extended by one year. *See* Att'y Gen. Order No. 3081-2009, available at

http://www.ojp.usdoj.gov/smart/pdfs/sornaorder.pdf. [8] While it might, then, appear that it is impossible for an offender to comply with the requirements of SORNA and thus any prosecution under 18 U.S.C. § 2250(a) is impossible, courts have universally rejected such a conclusion. One district court explained why the unusual situation presented by states' failure to comply with SORNA did not preclude prosecutions of persons under 18 U.S.C. § 2250(a):

> An offender's registration under SORNA does not hinge on implementation in his state. Gould highlights the differences between SORNA and existing Maryland sex offender registration requirements and contends that Maryland did not have the infrastructure available for Gould to comply with SORNA. Gould contends that his failure to register under Maryland law has no bearing on his failure to register under SORNA. Gould's argument is misplaced. Although the obligations imposed under SORNA differ from those under Maryland law, Gould had a duty to register his name and address with the Maryland authorities. Maryland's failure to implement SORNA does not

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[8] In particular, as relevant to Carr's case, the Seventh Circuit noted that in Indiana, the state "ha[d] yet to establish any procedures or protocols for the collection, maintenance, and dissemination of the detailed information required by the Act...." *Dixon*, 551 F.3d at 582.

> preclude Gould's prosecution under § 2250(a).

United States v. Gould, 526 F. Supp. 2d 538, 542 (D. Md. 2007).

The result of lower court willingness to comply with the wishes of federal prosecutors in such cases, wherein the statute has been used to prosecute persons even when the means of compliance were absent, has been that SORNA effectively applied federal punishment to persons for a state law violation. Thus, the prosecution of Carr, like that of other defendants subject to 18 U.S.C. § 2250(a) indictments, will result in increased punishment for such individuals.

However, a state law violation was not the only means underlying a theory for prosecuting sex offenders under 18 U.S.C. § 2250(a) without a new federal apparatus for compliance in place. Another way that federal prosecutors have contended that a sex offender could be prosecuted under SORNA was based upon a violation of the previous federal scheme for the registration of sex offenders under the Jacob Wetterling Crimes against Children and Sexually Violent Offender Registration Act ("Wetterling Act"), Pub. L. No. 103-322 tit. XVII, subtit. A, 108 Stat. 2038-2042 (1994). In its brief before the Seventh Circuit, the government contended that a SORNA defendant "was already notified of his registration obligations [under Wetterling], and SORNA

did nothing to change those obligations." Gov't C.A. Br. at 17, *United States v. Dixon* (No. 08-1438).[9]

But the penalties under both the Indiana law and the Wetterling Act were very different than those under SORNA. In most cases, under Indiana law, failure to register was a Class D felony with a possible prison sentence of up to three years. (Pub. L. 140-2006, § 13, 2006 Ind. Acts 2327-28 (codified as amended at Ind. Code § 11-8-8-17)); Ind. Code § 35-50-2-7(a). The Wetterling Act treated failing to register as a misdemeanor. *United States v. Patterson*, No. 8:07CR159, 2007 WL 2904099, at *2 (D. Neb. Sept. 21, 2007). SORNA, however, authorized a penalty of up to ten years imprisonment. 18 U.S.C. § 2250(a). Regardless of which theory for a violation

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[9] Notably, the requirements and definitions in SORNA were greater than those of the Wetterling Act and the various state laws. For example, SORNA required far more information to be given as part of the registration process. The Wetterling Act required an offender's current address, a photograph, and fingerprints. 42 U.S.C. § 14072(c). In contrast, SORNA required sex offenders to provide their Social Security number, a palm print, DNA, employer information, school information (if relevant), details of the offenders vehicle, copy of the offender's driver's license, aliases used on the Internet including email addresses and instant messaging names, telephone numbers, and details of the offenders passport. 42 U.S.C. § 16914(a)-(b); National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. at 38,054-38,058 (July 2, 2008). Similarly to the narrow requirements of the Wetterling Act, the Indiana registration statute did not require, for example, telephone numbers, a palm print, passport details, or DNA. Ind. Code § 11-8-8-8.

was applied, the government asked for greater punishment to be applied to a pre-existing crime based upon conduct that occurred before the enactment of SORNA.

Because the prosecution of Thomas Carr under 18 U.S.C. § 2250(a) necessitated that he was punished for an action that was completed before the enactment of SORNA, it is incompatible with the Ex Post Facto Clause. Whether the prosecution was based upon a state law or Wetterling Act violation, the constitutional outcome is the same: Carr was subject to the very type of retrospective punishment that the Framers sought to prevent.

CONCLUSION

While the petitioner's brief makes a compelling case for resolving this case in favor of Carr on statutory grounds, there are significant reasons for the Court to address and resolve the Ex Post Facto Clause argument in favor of the petitioner as well. Lower courts have created a complete mess of Ex Post Facto law in SORNA cases by confusing the rules of retrospectivity, as the Seventh Circuit did, deciding that a criminal statute with substantial prison penalties was not intended to be punitive, and that lengthy imprisonment and other restraints in SORNA are not punitive in effects. Especially because the Government has effectively neutralized the Ex Post Facto issues by not appealing any district court judgments where it lost the issue, this is an issue that should be addressed in the present matter. The Court should take this opportunity to restate the importance of the Ex Post Facto Clause and provide clear guidance to lower courts in addressing SORNA and other statutes. This will ensure that the Clause provides the necessary bulwark against ill-intentioned legislatures, maintains a proper separation of powers, and preserves the basic

right of fair notice. Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted.

COREY RAYBURN YUNG
John Marshall Law School
315 S. Plymouth Ct.
Chicago, IL 60604
(312) 386-2863

DOUGLAS A. BERMAN
The Ohio State University
Michael E. Moritz College of Law
55 West 12th Ave.
Columbus, OH 43210
(614) 688-8690

WAYNE A. LOGAN
Florida State University College of Law
425 W. Jefferson St.
Tallahassee, FL 32306
(850) 644.4759

AMY L. NEUHARDT
Counsel of Record
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. NW
Washington, DC 20015
(202) 274-1137

Counsel for Amici Curiae

DECEMBER 9, 2009

APPENDIX

FULL LIST OF AMICI CURIAE:

Douglas A. Berman
William B. Saxbe Designated Professor of Law
The Ohio State University
Michael E. Moritz College of Law

Tamar R. Birckhead
Assistant Professor of Law
University of North Carolina School of Law

Michael T. Cahill
Professor of Law
Brooklyn Law School

Gabriel J. Chin
Chester H. Smith Professor of Law
University of Arizona James E. Rogers
College of Law

William V. Dunlap
Professor of Law
Quinnipiac University School of Law

David A. Harris
Professor of Law
University of Pittsburgh School of Law

Wayne A. Logan
Gary & Sallyn Pajcic Professor
and Associate Dean for Academic Affairs
Florida State University College of Law

Michael J. Zydney Mannheimer
Associate Professor of Law
Salmon P. Chase College of Law,
Northern Kentucky University

Michael O'Hear
Professor of Law and
Associate Dean for Research
Marquette University Law School

J.J. Prescott
Assistant Professor of Law
University of Michigan Law School

L. Song Richardson
Assistant Professor of Law and
Co-Director Center for Law and Science
DePaul University College of Law

Ira P. Robbins
Barnard T. Welsh Scholar and Professor of Law
and Justice
American University, Washington College of Law

David Rudovsky
Senior Fellow
University of Pennsylvania Law School

Corey Rayburn Yung
Associate Professor of Law
John Marshall Law School

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(5)

No. 08-1301

Supreme Court, U.S.
FILED
DEC 10 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

THOMAS CARR,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Seventh Circuit

BRIEF FOR THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Barbara E. Bergman
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-3304

Jonathan L. Marcus
Counsel of Record
Gregory M. Lipper
Bradley K. Ervin
Elizabeth Canter*
Jesse Gurman**
COVINGTON & BURLING LLP
1201 Pennsylvania Ave., NW
Washington, DC 20004
(202) 662-6000

Counsel for Amicus Curiae

December 2009

*Admitted in Virginia, not in the District of Columbia; **admitted in California, not in the District of Columbia. Supervised by principals of the firm.

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Interest Of *Amicus Curiae*

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.[1] Founded in 1958, NACDL has a membership of more than 12,000 and affiliate memberships of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has participated as *amicus* in many of the Court's most significant criminal cases. Among other things, NACDL seeks to ensure that criminal statutes comply with fundamental constitutional guarantees, including the prohibition against ex post facto laws. In addition, NACDL has scrutinized laws, including registration and notification regimes, governing convicted sex offenders. Through its Sex Offender Policy Task Force, NACDL seeks to ensure that sex offender notification and registration laws

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[1] Each party has consented to the filing of this brief. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

protect due process rights and derive from empirically-based assessments of risk.

Summary Of Argument

The Seventh Circuit's interpretation of the criminal provisions of the Sex Offender Registration and Notification Act ("SORNA" or "the Act") raises significant constitutional concerns, and the Court should construe the Act to avoid them.

First, the Seventh Circuit's construction—under which SORNA's criminal provisions apply retroactively to individuals whose interstate travel predated the Act's enactment—raises serious constitutional concerns under both the Ex Post Facto Clause and the Commerce Clause. Retroactive application implicates the Ex Post Facto Clause because SORNA raises the maximum sentence from one year to ten years for criminal conduct (failure to register within ten days of interstate travel) that took place entirely before SORNA was enacted. Retroactive application raises serious concerns under the Commerce Clause because interstate travel that took place potentially years before the Act's enactment is the only purported basis for the exercise of Congress's commerce authority. In both cases, these serious constitutional concerns can be avoided by rejecting the Seventh Circuit's interpretation and holding, as Petitioner argues, that SORNA applies only to individuals whose interstate travel postdated the Act's enactment.

Second, and contrary to the government's assertions, application of the constitutional avoidance

canon would not undermine Congress's goal of preventing sex-offender recidivism. A substantial body of empirical research illustrates that registration-and-notification regimes such as SORNA fail to prevent sex-offender recidivism and in some cases actually increase it. Among other things, registration-and-notification regimes interfere with offenders' reintegration into society and divert law-enforcement resources from targeting the highest-risk offenders. Because limiting the retroactive reach of SORNA's criminal provisions would not hamper Congress's goal of preventing recidivism, there is no reason to refrain from applying the canon of constitutional avoidance and holding that the Act's criminal provisions do not apply to individuals whose interstate travel predated their enactment.

Argument

I. Retroactive Application Of SORNA's Criminal Provisions Raises Serious Constitutional Concerns Under The Ex Post Facto Clause And The Commerce Clause.

In holding that SORNA's criminal provisions apply retroactively, the Seventh Circuit overlooked the serious constitutional concerns that arise from application to individuals, such as Petitioner, who traveled in interstate commerce before the Act's enactment. The Court "avoid[s] an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Gomez v. United States*, 490 U.S. 858, 864 (1989). Thus, "when deciding

which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005).

Here, the doctrine of constitutional avoidance requires the Court to construe the criminal provisions of the Act not to reach Petitioner—whose interstate travel predated SORNA's enactment—to avoid serious concerns under (1) the Ex Post Facto Clause and (2) the Commerce Clause.

A. The Seventh Circuit's Construction of SORNA Raises Serious Concerns under the Ex Post Facto Clause.

Petitioner committed the crime that triggers criminal liability under SORNA—a failure to register within three days upon changing his residence—before SORNA was enacted. Yet under the Seventh Circuit's interpretation of SORNA, Petitioner was eligible to receive ten times the sentence that he would have received had he been charged and convicted at the time his offense became complete. Given the dictates of the Ex Post Facto Clause, the Seventh Circuit's construction of the Act "raises substantial enough constitutional doubts to warrant the employment of the canon." *United States v. Sec. Indus. Bank*, 459 U.S. 70, 74 (1982).

1. Retroactive application of the Act's criminal provisions—in a manner that subjected Petitioner to ten times the maximum sentence for a crime committed before SORNA's enactment—conflicts with the fundamental principle that retroactive legislative enactments "neither accord with sound legislation, nor the fundamental principles of the social compact." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 397 (1798). The Framers considered the prohibition of ex post facto laws among "the first principles of Legislation." James Madison, *The Debates in the Federal Convention of 1787* 449 (G. Hunt & J. Scott eds., 2007) (statement of James Wilson). The sentiment against ex post facto laws was so plain that the Framers debated removing the express prohibition from the Constitution as unnecessary because "there was no lawyer, no civilian who would not say that ex post facto laws were void of themselves." *Id.* (statement of Oliver Ellsworth); *see also id.* (statement of Gouverneur Morris) (finding the "precaution as to ex post facto laws unnecessary"); *id.* (statement of James Wilson) (noting danger in prohibiting plainly invalid laws, which suggested drafters' "ignoran[ce]" of principles of legislation). The prohibition, moreover, "very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws." *Calder*, 3 U.S. at 389–91.

The Ex Post Facto Clause's prohibitions apply not only to legislation that "imposes a punishment for an act which was not punishable at the time it was committed," but also to a law that "imposes *additional punishment* to that then prescribed." *Cummings v. Missouri*, 71 U.S. 277, 325–26 (1866)

(emphasis added). Thus, Petitioner need only show "that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." *Johnson v. United States*, 529 U.S. 694, 699 (2000).

For Petitioner, and others who traveled before its enactment, SORNA's heightened criminal penalty impermissibly "changes the legal consequences of acts completed before its effective date." *Weaver v. Graham*, 450 U.S. 24, 31 (1981).

Pre-SORNA (Maximum sentence = 1 year). Petitioner committed and completed the crime of failing to register before SORNA's enactment. After he was released from prison in Alabama in 2004, Petitioner moved to Indiana in 2004 or 2005. Pet. App. 5a. At that time, sex offenders such as Petitioner who moved from one state to another were governed only by the Wetterling Act, Pub. L. 103-322, 108 Stat. 1796 (1994). The Wetterling Act required a convicted sex offender who moved to another state to update his registration in the new state "not later than 10 days after that person establishes a new residence." *Id.* at 2041. Following the law's amendment in 1996, anyone who committed a knowing violation of the Wetterling Act by failing to register, including those who failed to register within ten days of moving to a new state, could be imprisoned for "not more than 1 year." Pub. L. No. 104-236, 110 Stat. 3093, 3096 (1996).

Upon arriving in Indiana in 2004 or 2005, Petitioner failed to register within 10 days of establishing a new residence. As a result, he had committed and completed a violation of the Wetterling Act. Had he been charged and convicted at the time, he would have been subject to imprisonment for "not more than 1 year." *Id.*

Post-SORNA (Maximum sentence = 10 years). SORNA took effect on July 27, 2006—at least a year *after* Petitioner had traveled to Indiana and violated the Wetterling Act by failing to register within 10 days of his arrival there. By interim rule of February 28, 2007, the Attorney General applied SORNA to individuals, like Petitioner, whose conviction predated SORNA's enactment. *See* 72 Fed. Reg. 8894 (Feb. 28, 2007), *codified at* 28 C.F.R. § 72.3.

For someone in Petitioner's circumstances, the crime under SORNA is identical to the crime under the Wetterling Act. First, SORNA does not require the provision of new information. Although SORNA purports to require sex offenders to provide additional information (above and beyond the information required in the Wetterling Act), the United States, in enforcing SORNA, takes the position that its registration requirements are identical to those of the Wetterling Act. *See* Pet'r Br. at 11–12, 39. Thus, the Wetterling Act had already required Petitioner to provide every piece of information required by SORNA.

Second, SORNA did not provide any additional time to register. Whereas the Wetterling Act required registration within ten days of moving to an-

other state, SORNA requires registration within three days of any change of residence. Thus, if SORNA's criminal provisions apply to interstate travel that predated its enactment, then any sex offender like Petitioner who violated the Wetterling Act—by failing to register within ten days of moving to another state—necessarily violated SORNA by failing to register within three days of moving.

As a practical matter, SORNA changed only one thing: the maximum sentence increased tenfold for conduct already completed. Under SORNA, individuals who travel in interstate commerce and knowingly fail to register within three days of moving "shall be fined under this title or imprisoned not more than 10 years, or both." 18 U.S.C. § 2250(a). Before SORNA's enactment, Petitioner had already completed (or failed to complete) all of the acts necessary to commit a crime under the Wetterling Act. As a result, retroactive application of SORNA "inflicts a greater punishment, than the law annexed to the crime, when committed." *Calder*, 3 U.S. at 390. *See, e.g., Miller v. Florida*, 482 U.S. 423, 431–32 (1987) (Ex Post Facto Clause prohibited retroactive increase in a crime's presumptive prison sentence); *Weaver*, 450 U.S. at 33–35 (Ex Post Facto Clause prohibited "reduc[tion of] the number of monthly gain-time credits available to an inmate").

Even if SORNA somehow did create additional registration obligations (beyond those of the Wetterling Act), it would have been impossible for Petitioner to comply with them. Before SORNA became law, he had already engaged in interstate travel and had already failed to register "not later than 3 busi-

ness days" after his change of residence from Alabama to Indiana. 42 U.S.C. § 16913(c). Thus, his criminal liability would have been instantaneous.

2. Although the Seventh Circuit acknowledged these concerns, the court appeared to address them by stating that the Ex Post Facto Clause permits "[l]aws [1] increasing the punishment for repeating an offense (or [2] punishing the continuation of conduct begun before the law was passed)." Pet. App. 9a. Even assuming that the Seventh Circuit is correct about this general proposition, it does not alleviate the constitutional concerns triggered by applying SORNA retroactively. First, under this Court's precedent, failure to register is not a continuing offense under either the Wetterling Act or SORNA. Second, even if SORNA is thought merely to increase the punishment for "repeating" the offense of failing to register, the Seventh Circuit could avoid the constitutional concerns only by creating an atextual "grace period" in which individuals such as Petitioner who traveled interstate before SORNA was enacted had an additional, "reasonable time" to register. Pet. App. 10a. As a result, SORNA's serious constitutional concerns remain.

a. Under this Court's precedents, neither SORNA nor the Wetterling Act created "a continuing offense in the sense of an offense that can be committed over a length of time." Pet. App. 3a. As discussed above, unless failure to register is somehow a "continuing offense," SORNA subjected Petitioner to enhanced penalties for a crime that he committed and completed before SORNA's enactment.

But failure to register in accordance with the time period prescribed by either the Wetterling Act (10 days) or SORNA (3 days) is not a continuing offense. Criminal conduct is not "continuing" "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *United States v. Toussie*, 397 U.S. 112, 115 (1970). Congress knows how to create a continuing offense and has done so in other statutes requiring certain individuals to register with the government. *See, e.g.*, 22 U.S.C. § 618 (failure to register as foreign agent within 10 days of becoming such an agent is "a continuing offense"); 50 U.S.C. § 856 (same for failure to register as trained in foreign espionage systems). The failure of Congress to do so here—under either the Wetterling Act or SORNA—speaks volumes.

Nor is continuing-offense treatment inherent in the nature of a registration requirement. In *Toussie*, the defendant failed to comply with a criminal statute that required him to register for the draft within five days of reaching age 18, but he was not indicted for the crime until eight years later. In holding that the prosecution was barred by the crime's five-year statute of limitations, the Court rejected the government's argument that the crime was a continuing offense. 397 U.S. at 114. The Court stated: "There is . . . nothing inherent in the act of registration itself which makes failure to do so a continuing crime. Failing to register is not like a conspiracy which the Court has held continues as long as the conspirators

engage in overt acts in furtherance of their plot." *Id.* at 122.

In holding that failure to register was a "continuing offense," the Seventh Circuit overlooked the Court's holding in *Toussie*: "[W]e do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses." *Id.* at 119. Instead, the Court construed the registration provision to provide "that a man must register at a particular time and his failure to do so at that time is a single offense." *Id.* Nothing in Wetterling or SORNA compels a different result.

Because failure to register is not a continuing offense, Petitioner had already committed and completed the crime well before SORNA was enacted and was thus subject to a maximum punishment of one year imprisonment. To hold otherwise and expose him to ten years' imprisonment for the same crime would trigger the prohibitions of the Ex Post Facto Clause.

b. To the extent that SORNA is read to impose a registration obligation distinct from the Wetterling Act, or to "increas[e] the punishment for repeating an offense," Pet. App. 9a, it would have been impossible for Petitioner to comply. At the time of SORNA's enactment, Petitioner had necessarily violated the statute by failing to register within three days of his relocation to Indiana, which had taken place years before. As a result, he could not have brought himself into compliance simply by refraining from certain conduct following SORNA's enactment;

to the contrary, he would have been in violation of SORNA immediately once it took effect.

Because SORNA imposed an affirmative obligation that Petitioner had already failed to fulfill, the Seventh Circuit created an accommodation—one that is found nowhere in the Act's text and whose scope was left entirely to the court's discretion. Specifically, the Seventh Circuit surmised that individuals would not have been required to register immediately upon enactment of SORNA; instead, the court "assume[d] that [offenders] would have to register within a reasonable time." Pet. App. 10a. The Seventh Circuit elaborated that "on our interpretation of the statute as filled out by the regulation, the duty to register does not come into force on the day the Act becomes applicable to a person, or on the next day or next week, but within a reasonable time." *Id.* at 12a. Applying this conception of "a reasonable time," the Seventh Circuit held that "[f]ive months is a sufficient grace period," such that Petitioner "had a reasonable time within which he could have registered." *Id.*

The Seventh Circuit's analysis is a recipe for judicial fiat. Neither the Act itself nor the Attorney General's regulations provide sex offenders with a "grace period" within which to register. And the court's holding that five months was a sufficient grace period was conclusory and unaccompanied by any additional discussion, let alone citation to relevant legal authority. The Seventh Circuit was thus forced both to invent a "grace period" that Congress did not provide or authorize, and then to determine

the length of that "grace period" without any guiding principle.

In addition to inviting arbitrary judicial line drawing, the Seventh Circuit's approach raises serious concerns about proper notice. SORNA requires notification to convicted sex offenders of their registration requirements. *See, e.g.*, 42 U.S.C. § 16917(b) ("The Attorney General shall prescribe rules for the notification of sex offenders who cannot be registered [before their release from custody or immediately after their sentencing]."). Under the Seventh Circuit's approach, would-be defendants must guess about what length of time is reasonable: more than an hour, a day, or a week, apparently, but also less than five months. Pet. App. 12a. *See, e.g.*, *United States v. Williams*, 128 S. Ct. 1830, 1846 (2008) (statute would be unconstitutionally vague if it turned on "a subjective judgment such as whether conduct is 'annoying' or 'indecent'"); *Langford v. City of Omaha*, 755 F. Supp. 1460, 1463 (D. Neb. 1989) (city ordinance's prohibition of "unreasonable" noise "too vague to give adequate notice of what conduct is prohibited, and . . . too vague to ensure against arbitrary enforcement"). And the Seventh Circuit provided no specific guidance for defendants to make an educated guess.

Finally, under the Seventh Circuit's approach, the maximum length of Petitioner's potential sentence depended on the discretion of law enforcement, and law enforcement alone. Had law enforcement officials discovered and prosecuted Petitioner's failure to register at any point between the time of his travel to Indiana and the enactment of SORNA, he

would have been governed only by the Wetterling Act and faced imprisonment "for not more than 1 year." 42 U.S.C. § 14072(i)(4). Had he been charged after SORNA was enacted, but only a week after the Attorney General's implementing regulation went into effect, the Seventh Circuit would have held that he had not received a "sufficient grace period" within which to register. Petitioner faced imprisonment of up to ten years only because law enforcement did not uncover his completed crime until after SORNA's enactment, after the issuance of the Attorney General's regulation, and after the expiration of the Seventh Circuit's "sufficient grace period."

* * *

Because the Seventh Circuit's interpretation raises serious concerns under the Ex Post Facto Clause, the Court should apply the doctrine of constitutional avoidance and hold that SORNA does not apply to individuals whose interstate travel predated the Act's enactment.

B. The Seventh Circuit's Construction of SORNA Raises Serious Concerns under the Commerce Clause.

The Seventh Circuit's interpretation of SORNA also raises serious concerns that the Act exceeds Congress's authority under the Commerce Clause. In these circumstances, "it is appropriate to avoid the constitutional question that would arise were we to read [the statute] to render . . . 'traditionally local criminal conduct' . . . 'a matter for federal enforcement.'" *Jones v. United States*, 529 U.S. 848, 858

(2000) (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

Congress almost certainly would lack the authority to enact a sex-offender registration requirement devoid of any connection to interstate travel. Unlike regulations of commercial or economic transactions, criminal provisions like SORNA are within Congress's commerce clause authority only if the prohibited conduct itself has "an explicit connection with or effect on interstate commerce." *United States v. Morrison*, 529 U.S. 598, 611–12 (2000); *see United States v. Lopez*, 514 U.S. 549, 562 (1995). Applying this standard, several courts have invalidated SORNA's registration requirement, which requires all sex offenders to register in certain jurisdictions whether or not the individual has traveled or otherwise affects interstate commerce. *See, e.g.*, *United States v. Waybright*, 561 F. Supp. 2d 1154, 1164 (D. Mont. 2008) ("Section 16913 has nothing to do with commerce or any sort of economic enterprise; it regulates purely local, non-economic activity."); *United States v. Hall*, 577 F. Supp. 2d 610, 619–22 (N.D.N.Y. 2008) (Section 16913 exceeds Congress's commerce authority); *United States v. Myers*, 591 F. Supp. 2d 1312, 1332–36 (S.D. Fla. 2008) (same); *United States v. Guzman*, 582 F. Supp. 2d 305, 310–14 (N.D.N.Y. 2008) (same).

The courts that have upheld § 2250 against Commerce Clause challenges have explicitly or implicitly rested on its requirement that covered individuals have previously traveled in interstate commerce. *See, e.g.*, *United States v. Whaley*, 577 F.3d 254, 258 (5th Cir. 2009) ("Because § 2250 applies only to those failing to register or update a reg-

istration after traveling in interstate commerce—in this case, Whaley traveled from Kansas to Texas—it falls squarely under the first *Lopez* prong."). This type of jurisdictional element, however, provides a meaningful limitation on the federal government's commerce power only if the travel at issue postdated SORNA's enactment.

Indeed, and as Petitioner explains, if SORNA is applied to pre-enactment travel, it necessarily would apply even to travel that predated the underlying conviction for a sex offense. Pet'r Br. 34–35. Thus, an individual who moved from Alabama to Indiana in 1950, was convicted of a sex crime in 1990, was released from prison in 2000, and then resumed living at his Indiana residence would still be subject to SORNA's enhanced criminal penalties. Under these circumstances, the link between interstate travel and interstate commerce could hardly be more attenuated. Even the Seventh Circuit recognized the potential for this illogical result and asserted only that "[s]ince the statutory aim is to prevent a convicted sex offender from circumventing registration by leaving the state in which he is registered, it can be argued that the travel must postdate the conviction." Pet. App. 4a. Like the Seventh Circuit's invention of a "grace period," this assertion lacks any basis in SORNA's text.

If *Lopez* and *Morrison* meaningfully limit the federal government's authority, the Commerce Clause "could never mean that once a person has traveled across state lines Congress is free to attach any regulation to him it deems fit." *Myers*, 591 F. Supp. 2d at 1349. The Court has rejected the proposition that

Congress could "use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," *Morrison*, 529 U.S. at 615, or that broad theories of commerce power could be established from which it would be "difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign." *Lopez*, 514 U.S. at 564. Yet here, the government seeks to impose registration requirements based on an individual's interstate travel that predated the Act, and the logic of the government's argument would result in application of SORNA even to someone who traveled prior to his conviction for a sex offense.

If Congress is permitted to exercise commerce clause power over sex offenders based on nothing more than their interstate travel in the distant past, then it might also regulate marriages performed by clergy who at one point traveled in interstate commerce or local kindergarten classes taught by teachers who at one point traveled in interstate commerce. Such a regime would be a far cry from *Lopez*, in which the Court contemplated that Congress might have acted within its authority if the defendant "had *recently* moved in interstate commerce." *Lopez*, 514 U.S. at 567 (emphasis added).

The Seventh Circuit's reading of the statute imposes federal criminal liability for wholly intrastate criminal conduct so long as an individual has previously traveled in interstate commerce—even if years or decades ago. This interpretation raises serious questions about whether Congress's commerce au-

thority stretches so far as to allow Congress to regulate anyone who has ever traveled in interstate commerce. Petitioner's interpretation avoids these serious constitutional concerns and should be adopted.

II. Construing SORNA To Avoid Constitutional Concerns Would Not Undermine Congress's Efforts To Reduce Recidivism.

As Petitioner explains, SORNA need not apply retroactively to fulfill its purpose. Pet'r Br. 28–35. In addition, recent empirical evidence illustrates that registration-and-notification requirements, such as those contained in SORNA, do not reduce recidivism and in some cases increase it. Thus, application of the avoidance canon to SORNA would not interfere with Congress's goal of preventing sex-offender recidivism.

The benefits of registration-and-notification regimes, such as those implemented by SORNA, appear to be marginal at best. Sex offenders re-offend far less frequently than commonly believed; "approximately 96% of offenders arrested for sexual offenses have no prior sexual offense convictions, and, thus, would not have been on a sex offender registry at the time of the offense." Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol. Pub. Pol'y & L. 284, 297 (2008). Although some subgroups of sex offenders do appear to pose a higher risk of recidivism than do sex offenders as a whole, SORNA's "risk tier" registra-

tion system fails to incorporate these factors. Rather, SORNA divides offenders into three tiers based solely on their crime of conviction and the length of their sentence: Tier 1 includes misdemeanors with less than one year of imprisonment, and Tiers 2 and 3 include felonies differing in type and level of severity. *See* 42 U.S.C. § 16911.

Remarkably, SORNA gets it backwards: "those offenders classified as Tier 1 (lowest risk) were rearrested for both sexual and nonsexual offenses more quickly than both Tier 2 (moderate risk) and Tier 3 (highest risk) offenders and were rearrested for sexual offenses at a higher rate than Tiers 2 and 3 offenders." Naomi J. Freeman & Jeffrey C. Sandler, *The Adam Walsh Act: A False Sense of Security or an Effective Public Policy Initiative?* (Crim. Just. Pol'y Rev. Online First, June 2009), at 13. Thus, "the system proposed in SORNA actually decreases the ability of states to predict which sex offenders will sexually reoffend and which ones will not." *Id.* at 15.

Whatever the recidivism rates of sex offenders, registration-and-notification laws, including federal laws, do not appear to lower them. Studies of registration and notification in several states have found no statistically significant differences in recidivism rates between offenders subject to registration-and-notification requirements and those who are not.[2]

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[2] *See* Donna D. Schram & Cheryl Darling Milloy, *Community Notification: A Study of Offender Characteristics and Recidivism* 3 (1995), *available at* http://www.wsipp.wa.gov/rptfiles/chrrec.pdf (Washington); Geneva Adkins et al., Iowa Dept. of Human Rights, *The Iowa Sex Offender Registry and Recidivism* 19 (2000), *available at* http://www.state.ia.us/gov-

According to a recent analysis of recidivism rates using Bureau of Justice Statistics data from fourteen states, "sex offender recidivism is not reduced by having to register and if anything it is slightly increased." Amanda Y. Agan, *Sex Offender Registries: Fear without Function?* 25 (Dec. 1, 2008) (unpublished manuscript, University of Chicago Department of Economics), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1437098.

Although one study has found a reduction in recidivism attributable to the registration component of sex offender laws, this same study also concluded that the notification component of laws such as SORNA resulted in a statistically significant *increase* in subsequent crimes by registered offenders. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?* 23–26 (Nat'l Bureau of Econ. Research, Working Paper No. 13803, 2008), *available at* http://www.nber.org/papers/w13803.[3] And notifica-

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ernment/dhr/cjjp/images/pdf/01_pub/SexOffenderReport.pdf (Iowa); Richard G. Zevitz, *Sex Offender Community Notification: Its Role in Recidivism and Offender Reintegration*, 19 Crim. Just. Stud. 193, 193 (2006) (Wisconsin); Jeffrey C. Sandler et al., *Does a Watched Pot Boil?: A Time-Series Analysis of New York State's Sex Offender Registration and Notification Law*, 14 Psychol. Pub. Pol'y & L. 284, 295-97 (2008) (New York); Kristen Zgoba et al., N.J. Dept. of Corr., *Megan's Law: Assessing the Practical and Monetary Efficacy* 39 (2008), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/225370.pdf (New Jersey).

[3] Another study concluded that Washington State's 1990 law reduced certain types of sexual offense recidivism, but this study suffered from significant methodological limitations. For

tion is an integral part of SORNA's registration regime. To implement the Act, states must "make available on the Internet . . . all information about each sex offender in the registry," 42 U.S.C. § 16918(a), and "provide the information in the registry" to *any* "organization, company, or individual who requests such notification," *id.* § 16921(b).

In using registration as a vehicle for widespread notification, SORNA increases the risk of recidivism. Research confirms that "convicted sex offenders become more likely to commit crime when their information is made public because the associated psychological, social, or financial costs make crime more attractive." Prescott & Rockoff, *supra*, at 4. These costs—which include job loss, housing disruption, threats of harassment, property damage, and even physical assault[4]—increase the likelihood of re-

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instance, the study was unable to rule out historical variations in the general crime rate. *See* Robert Barnoski, Wash. State Inst. for Pub. Policy, *Sex Offender Sentencing in Washington State: Has Community Notification Reduced Recidivism?* 3 (2005), *available at* http://www.wsipp.wa.gov/rptfiles/05-12-1202.pdf; Sandler et al., *supra*, at 286–87.

[4] *See* Jill S. Levenson et al., *Megan's Law and its Impact on Community Re-Entry for Sex Offenders*, 25 Behav. Sci. & L. 587, 593–94, 597 (2007) (surveys of offenders in Indiana, Connecticut, and Florida showed job loss ranging from 19–27%, housing disruption from 15–21%, threats and harassment from 21–33%, and property damage from 17–21%.); *id.* at 596 (in Kentucky, 43% of offenders reported job loss, 45% housing problems, and 47% harassment); Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance?*, 18 Behav. Sci. Law 375 (2000) (in Wisconsin, overwhelming majority reported these types of consequences)); *id.* (offenders also reported being

cidivism by making it more difficult for registrants to reintegrate and thus harder to resist further criminal activity. *See* Freeman & Sandler, *supra*, at 16; Bruce J. Winick, *Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis*, 4 Psych. Pub. Pol'y & Law 505, 556 (1998).

Not only do the side effects of registration-and-notification laws lead offenders to re-offend, but broad-based laws like SORNA also impose significant financial costs and distract law enforcement from focusing on the specific individuals who pose the highest risk of recidivism. SORNA requires that states register all sex offenders, regardless of the seriousness of the crime. In Virginia, the total cost of implementing SORNA was estimated to be almost $12.5 million in the first year, and $8.9 million every year thereafter. Justice Policy Inst., *What Will It Cost States to Comply with the Sex Offender Registration and Notification Act?* 1 (2008), *available at* http://www.njjn.org/media/resources/public/resource_840.pdf. Compliance costs are estimated to be in the millions for every state except Wyoming, and in the tens of millions for larger states such as California ($59 million), Florida ($29 million), New York ($31 million), Texas ($39 million), and others. *Id.* at 2.

Thus, the addition of thousands of offenders, many or most of whom are unlikely to re-offend, hinders law enforcement in monitoring the smaller subset of registrants who represent true recidivism

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physically assaulted due to their status, at rates ranging from 3–16% across different states).

threats. *See* Ryan Knutson & Justin Scheck, *Sex-Registry Flaws Stand Out*, Wall St. J., Sept. 3, 2009, at A5 (describing concerns raised by law-enforcement officials). Moreover, states that spend the millions of dollars needed to operate the registries have fewer if any funds to devote to offender rehabilitation, which, unlike registries, has demonstrated at least some promise of reducing recidivism. *See* Jill S. Levenson, Sex Offense Recidivism, Risk Assessment, and the Adam Walsh Act (Testimony before Vermont State Legislature 6 (Oct. 16, 2008)), *available at* http://www.leg.state.vt.us/WorkGroups/sexoffenders/AWA_SORNsummary.pdf.

In sum, Congress's goal of reducing sex-offender recidivism does not offer a reason to refrain from applying the doctrine of constitutional avoidance, given the serious constitutional concerns raised by the Seventh Circuit's interpretation and SORNA's dubious ability to combat recidivism.

Conclusion

The Seventh Circuit's judgment should be reversed.

Respectfully submitted,

Barbara E. Bergman
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
1117 Stanford, NE
Albuquerque, NM 87131
(505) 277-3304

Jonathan L. Marcus
Counsel of Record
Gregory M. Lipper
Bradley K. Ervin
Elizabeth Canter*
Jesse Gurman**
COVINGTON & BURLING LLP
1201 Pennsylvania Ave, NW
Washington, D.C. 20004
(202) 662-6000

Counsel for Amicus Curiae

*Admitted in Virginia, not in the District of Columbia; **admitted in California, not in the District of Columbia. Supervised by principals of the firm.

December 10, 2009